(18)

No. 129 Original

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

LODGING IN SUPPORT OF THE STATE OF MARYLAND'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,	*	No. 129, Original
Plaintiff,	*	Before Special Master
v.	*	Ralph I. Lancaster, Jr.
STATE OF MARYLAND,	*	
Defendant.	*	

* * * * * * * * * * *

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Maryland seeks the entry of summary judgment in its favor because there is simply no merit in Virginia's claim that Maryland's waterway permitting laws "infringe upon Virginia's sovereignty" and "impede and interfere with Virginia's rights of access to the Potomac River." Complaint ¶ 48. Maryland's present-day regulation of the river is comprehensive in all respects and the result of such longstanding ownership of the Potomac that Virginia has acknowledged it since colonial times. Virginia's claims are contradicted not simply by the history pre-dating Virginia's suit against Maryland, but also by the Commonwealth's continued recognition, even after suit was filed, that its authority over the river ends, and Maryland's begins, at the low-water mark boundary on the Virginia side of the river.

Maryland's authority over the Potomac River traces back almost four-hundred years to the time the Potomac was included in the territory granted by King Charles I to Lord Baltimore. That authority was explicitly recognized in Virginia's first Constitution, it was reaffirmed a century later by the Black-Jenkins Award, and it applies to the activity that Virginia now claims is beyond Maryland's jurisdiction, as that activity takes place in Maryland. Neither the Compact nor the Black-Jenkins Award contains any language that strips Maryland of this fundamental aspect of its ownership of and sovereignty over the River. On the contrary, both States have acted in innumerable ways since their adoption of the Award to reflect their clear understanding that the boundary described there represents the line of sovereignty for all purposes and confirms Maryland's right to regulate waterway construction activity in and water withdrawals from the Potomac River up to the low-water mark on Virginia's side. For these reasons, as discussed more fully below, Maryland's motion for summary judgment should be granted.

STATEMENT OF FACTS

Pre-Compact History

Virginia traces its territorial roots to 1609, when King James I of England issued a charter to the London Company encompassing all of the lands 200 miles north and south of Point Comfort and extending inland, without limitation, "from the sea, west and northwest." *Johnson v. McIntosh*, 21 U.S. 543, 544 (1823). This 1609 grant included within its reach much of the land now comprising Maryland and Pennsylvania, as well as the uninhabited western lands to the Pacific Ocean. It is on this 1609 grant that Virginia in earlier times based its historical claims to the Potomac, Maryland, and the frontier.

The 1609 grant was short-lived. As a result of a dispute between the London Company and the Crown, the grant was annulled in 1624 by judgment of the Court of King's Bench and the powers of government and title to the lands within the limits of the grant were re-vested in the Crown. *Johnson v. McIntosh*, 21 U.S. at 545. As of 1624, Virginia had become a royal colony, whose boundaries were subject to change at the pleasure of the Crown. *Id.*; *Howard v. Ingersoll*, 54 U.S. 381, 400 (1851).

In 1632, King Charles I issued to Lord Baltimore the charter that marks the origin of the Province and State of Maryland.[1] The charter encompassed land previously included within the annulled 1609 grant and specifically included the entire Potomac River from bank to bank. *Morris v. United States*, 174 U.S. 196, 225 (1899). The charter was also significant for the breadth of the powers vested in the newly created colony. *See* Declaration of Jack N. Rakove, Exhibit A, at 8 (Maryland's powers granted in Charter, and as a proprietorial colony,

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[1] Attached as Ex. 69 to Defendant's Brief in Opposition to Plaintiff's Motion For Partial Summary Judgment. All subsequent citations to exhibits that were attached to this earlier brief will have the form "Tidewater Exhibit."

provided it with "more extensive powers of governance within its respective bounds" than other colonies).

Virginia was aware of the breadth of the Maryland Charter and, in fact, argued before the King and the Lords Commissioners for Foreign Plantations that the Charter improperly granted Lord Baltimore powers of sovereignty far more expansive than those given the other colonies, including almost royal power to grant lands, declare war, and manage his colony independent of the other colonies.[2] The Lords Commissioners, after "having heard and maturely considered the sayde propositions, answers and reasons, and whatsoever else was alleged in either parte, did think fit to leave the Lord Baltimore to his Patent and the other partie to the course of Lawe according to their desire."[3]

Subsequent to the issuance of the Maryland Charter and the rejection of Virginia's challenge thereto, King Charles II issued patents in 1649 and 1688 for what is commonly known as the "Northern Neck" of Virginia – the land lying between, and including, the Potomac and Rappahanock rivers.[4] The 1688 grant was of no effect to the extent it purported to alter the boundary in Maryland's prior Charter because the Charter was "never devested by any valid proceedings prior to the Revolution, nor was such grant affected by the subsequent grant to Lord Culpeper" who never made "any substantial claim . . . to property rights in the Potomac river, or in the soil thereunder. . . ." *Morris v. United States*, 174 U.S.

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[2] Browne, ed., *Proceedings of the Council of Maryland, 1636-67* at 17-19 (Considerations upon the Patent to Lord Baltimore, 1632) (Exhibit CC-18).

[3] *Id.* at 22 (Order of the Lords Commrs. For Foreign Plantation, July 3, 1633).

[4] *Morris v. United States*, 174 U.S. at 223-24; *Maryland v. West Virginia*, 217 U.S. 1, 28 (1910).

at 225. *See also Marine Ry. & Coal Co., Inc.*, 257 U.S. 47, 63 (1921) ("The latter grant is subordinate to the former.").

Although the 1609, 1649, and 1688 grants did not alter the scope of Maryland's Charter, Virginia in 1776 formally renounced any rights or claims it may have harbored with respect to Maryland territory:

> [T]he territories within the charters erecting the colonies Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which may at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been made or shall be made thereon.[5]

The effect of Virginia's concession was not lost on James Madison, who, writing just eight years after the enactment of the Virginia Constitution, recognized that this provision constituted "an entire relinquishment of the Jurisdiction of these [the Potomac and Pocomoke] rivers."[6]

Maryland reacted swiftly and passed a resolution at a convention of its delegates in October of that year denying that Virginia had any territorial rights over the Potomac or any other portion of Maryland territory to begin with:

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[5] 1776 Va. Const. Art. 21, *reprinted in* Julian P. Boyd, ed., *Papers of Thomas Jefferson*, vol. 1, at 347-365 (Princeton, 1950) (Tidewater Exhibit 19).

[6] Madison to Jefferson (Mar. 16, 1784), *reprinted in* Robert A. Rutland, *The Papers of James Madison*, Vol. 8, at 10 (Tidewater Exhibit 34). *See also* Affidavit of Ronald Hoffman, Ph.D., Tidewater Exhibit A, at 36.

> Resolved unanimously, That it is the opinion of this convention, that the state of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first to Caecilius Calvert, baron of Baltimore.[7]

Maryland explicitly rejected Virginia's effort to reserve even limited rights in the Potomac:

> Resolved unanimously, That it is the opinion of this convention, That the sole and exclusive jurisdiction over the territory, bays, rivers, and waters, included in the said charter, belongs to this state; and that the river Potowmack, and almost the whole of the river Pocomoke, being comprehended in the said charter, the sole and exclusive jurisdiction over the said river Potowmack, and also over such part of the river Pocomoke as is comprehended in the said charter, belongs to this state; and that the river Potowmack and that part of Chesapeake bay which lies between the capes and the south boundary of this state, and so much thereof as is necessary to the navigation of the rivers Potowmack and Pocomoke, ought to be considered as a common highway, free for the people of both states, without being subject to any duty, burthens or charge, as hath been heretofore accustomed.[8]

Maryland's assertion of its Charter rights, like Virginia's disclaimer of any such rights, could not have been clearer.

The Compact of 1785

Thus, when the two States came to the negotiations that would result in the Compact of 1785, Maryland held a decided advantage with respect to the Potomac. Virginia had already conceded to Maryland "all the rights of property, jurisdiction, and government" in the Potomac, reserving only "the free navigation and use" of the river and property rights to the shore and shoreline improvements. As recognized by its congressional delegation less than twenty years later, Virginia claimed no rights of jurisdiction or governance whatsoever. *See, e.g., Annals of Cong.,* 8th Cong., 2nd Sess. at 715 (Tidewater Exhibit 84) (Virginia

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[7] Lucas & Deaver, eds., *Proceedings of the Conventions of the Province of Maryland* 292-93 (Baltimore, 1836) (Oct. 30, 1776) (Tidewater Exhibit 20).

[8] *Id*; *see also* Hoffman Aff., Tidewater Exhibit A, 25-28.

representative John Randolph, stating that "[Virginia's] limits did not extend beyond high water mark on the western bank of the Potomac. Her right of highway on the river was a natural right acknowledged and secured by convention with Maryland. Her civil jurisdiction over its water was a conventional right, entirely derived from compact with that State, was a jurisdiction not within her limits"), 717 (Randolph stating that Virginia's "concurrent jurisdiction over the Potomac" was "confessedly without her limits").

While the Compact was drafted to address generally issues of navigation and jurisdiction with respect to the Potomac and Pocomoke Rivers and the Chesapeake Bay, Virginia succeeded in Article VII of the Compact in obtaining Maryland's agreement that the citizens of Virginia who own land on the Potomac would have the "privilege" to build wharves and other improvements so long as those improvements do not impede navigation, and the common right of fishery. It was this last point that was most hotly contested, with George Mason noting for Virginia that "[t]he Idea of the Right of fishing on both Shores of Potomack River is one the Marylanders are not fond of parting with . . . ." Robert A. Rutland, *The Papers of George Mason*, vol. 2 at 838 (Tidewater Exhibit 67). Having successfully negotiated a common right of fishery, Mason noted "I trust it will be found we have obtained every thing for Virginia, with Respect to Potomack River, which she can desire." *Id.*

While Article VII addressed Potomac River access and use, Article VIII reaches specific but limited jurisdictional issues, agreeing that "all laws and regulations" for the preservation of fish, the performance of quarantine, or preserving and keeping open the channel and navigation of the Potomac "shall be made with the mutual consent and approbation of both states." Tidewater Exhibit 63; *Wharton v. Wise*, 153 U.S. 155, 163-66

(1894). No such provision is made in Article VII regarding the "laws and regulations" governing other uses of the River, including the privilege of wharfage recognized therein.

Maryland's Post-Compact Regulation of the Potomac through the Black-Jenkins Award Era

Maryland's regulation of the Potomac in the late 18th and 19th centuries is reflected in the actions of its legislature, courts, and its Commissioner of Land Records. The modern administrative State, and its attendant files and records, were still some years off, and so the regulatory record is reflected in periodic events that shed light on how Maryland exercised its sovereign role in the Potomac.

The first such event arises in the context of the creation of the District of Columbia. Maryland and Virginia each enacted laws ceding an area ten miles square for the formation the new Nation's capital. On December 23, 1788, Maryland passed "An act to cede to congress a district of ten miles square in this state for the seat of the government of the United States." *Morris v. United States*, 174 U.S. at 198 (citing Kilty's Laws Md. p. 46, Ch. 2). On December 3, 1789, Virginia passed its analog, purporting to cede property "on the banks of the river Patowmack, above tidewater." 1789 Va. Laws Ch. 32 (preamble). Subsequently, on September 8, 1791, Thomas Jefferson and James Madison attended a meeting of the District of Columbia commissioners in which the commissioners wrote the Maryland legislature:

> That it will conduct much to convenience and use, as well as beauty and order, that wharfing should be under proper regulations from the beginning. . . . Your memorialists therefore presume to submit to your honors whether it will not be proper to . . . enable the commissioners or some other corporation, till congress assumes the government, to license the building of wharves, of the materials, in the manner, and of the extent they may judge disirable and convenient, and agreeing with general order.

Morris v. United States, 174 U.S. at 306 (White, J., dissenting) (quoting letter). On

December 19, 1791, Maryland responded and passed amendatory legislation that ratified the earlier cession and gave the commissioners the powers they sought:

> That the commissioners aforesaid, for the time being, or any two of them, shall, from time to time, until congress shall exercise the jurisdiction and government within said territory, have power to license the building of wharves in the waters of the Patowmack and the Eastern Branch, adjoining the said city, of the materials, in the manner and extent, they may judge durable, convenient and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters without license as aforesaid; and if any wharf shall be built without such license or different therefrom, the same is hereby declared a common nuisance.

1791 Md. Laws Ch. 45, § 12. On July 20, 1795, the Board of Commissioners of the District of Columbia acted under Maryland's grant of authority to publish wharfing regulations, stating that such regulations were enacted "in virtue of the powers vested in them by the act of the Maryland legislature to license the building of wharves in the city of Washington." *Morris v. United States*, 174 U.S. at 283. After promulgation of the regulations, the Board in fact proceeded to issue licenses to individual wharves. *Id.*

With the bulk of commerce on the river originating in Georgetown, little record exists of Maryland's regulation of wharves and other improvements outside of the District of Columbia until 1862, when Maryland granted to each of its citizens owning land on the navigable waters of the State "the exclusive right of making improvements into the waters in front of his said land" provided that such improvements not "interfere with the navigation of the stream of water into which the said improvement is made," 1862 Md. Laws Ch. 129, § 46, and subject to the continuing regulation and control of the State legislature. *See, e.g.*, *Harbor Island Marina, Inc. v. Board of County Comm'rs of Calvert County, Md.*, 286 Md. 303, 318-319, 407 A.2d 738, 747 (1979) ("This Court has previously recognized that riparian rights are "subject . . . to (the) general rules and regulations (properly) imposed by the public

authorities (as) necessary to protect the rights of the public."). Maryland did not establish a formal licensing program for wharves, piers, and other improvements in the tidal portion of the Potomac until 1970.

Maryland's regulation of water withdrawals from the Potomac in the 19th century followed a similar pattern. Prior to Maryland's establishment in 1933 of a formalized permitting system, water rights disputes were resolved by the courts and the legislature. With respect to the Potomac, such disputes were decided by the Maryland courts. In the 1820s, Amos Binney went to the Maryland Chancery Court to secure, unsuccessfully, water rights for the operation of his mill on the Maryland shore against the increasing withdrawals of the Chesapeake & Ohio Canal Co. ("C&O Canal"). *Binney's Case*, 2 Bland 99 (Md. 1829). In the 1850s, the Great Falls Manufacturing Company of Virginia went to the Circuit Court for Montgomery County, Maryland, to press its claim for water rights on the Virginia shore of the Potomac against the Washington Aqueduct's withdrawals. *United States v. Great Falls Manufacturing Co.*, Circuit Court for Montgomery County, Maryland, *reprinted as* Sen. Doc. 42, 35th Cong., 2d Sess. (1859), Tidewater Exhibit 85.

The circumstances surrounding the *Great Falls Manufacturing* case show how other Maryland institutions, particularly the legislature and the Commissioner of Land Records, were regulating water rights in the Potomac. When the United States sought to withdraw water from the Potomac to supply the District of Columbia, it came to the Maryland legislature for approval. In 1853, the Maryland General Assembly passed "An Act giving the assent of the State of Maryland, to such plan as may be adopted by the President of the

United States, for supplying the City of Washington with Water." 1853 Md. Laws Ch. 179.[9] The Maryland Land Office also regulated water rights through the patent process. For example, when the Great Falls Manufacturing Company sought to secure water rights to the Potomac in the wake of the Montgomery County Circuit Court decision denying the same, it came to the Maryland Land Office to take out a patent to *Neilson's Desire*, which included the water within the Potomac between Conn's Island and the Virginia shore. *See United States v. Great Falls Manufacturing Co.*, 21 Md. 119 (Md. 1864).

Maryland's power to tax structures on the Potomac is likewise revealed during periodic episodes of litigation over the river. In the late 1850s, the Virginia and Maryland Bridge Co. at Shepherdstown, a Virginia corporation, contested the right of Maryland to tax a bridge across the Potomac at Shepherdstown, in what was then Virginia and is now West Virginia. With the Virginia Attorney General arguing on behalf of the Company, the Maryland Court of Appeals upheld the validity of the tax. *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. 1 (1861).

Maryland regulated bridges in other ways besides taxing them. In 1876, Maryland enacted a law requiring the approval of the Maryland Board of Public Works for all railway bridge crossings of Maryland's navigable waters. 1876 Md. Laws Ch. 242, § 21. This was a formal permitting regime, requiring the review and approval of specific plans and proposals. In 1907, the law was applied to a Virginia corporation, the Norfolk & Western Railway, which sought to construct a railway bridge across the Potomac and the C&O Canal

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[9] The Virginia law passed in connection with the construction of the Aqueduct does not address water withdrawals and is limited to providing consent for the United States' acquisition of "land necessary for an abutment and quarries for the construction of a dam across the Potomac." 1854 Va. Laws Ch. 5.

near Shepherdstown, West Virginia. As the General Manager of the C&O Canal twice noted in letters to the company, "It will be necessary to procure the approval of the Board of Public Works before you can cross the Potomac River." May 11, 1907 letter to Charles S. Churchill, Chief Engineer, Norfolk & Western Ry. Co. from G.L. Nicholson, General Manager, C&O Canal Co. (Exhibit Z-1 at MD-BPW-00039-40); *see also* May 17, 1907 letter to Charles S. Churchill, Chief Engineer, Norfolk & Western Ry. Co. from G.L. Nicholson, General Manager, C&O Canal Co. (Exhibit Z-2 at MD-BPW-00040) (noting that "[y]ou will, however, have to obtain the approval of the Board of Public Works for the crossing of the Potomac River, as well as the canal").

Post-Black-Jenkins Award History

Although Virginia by its 1776 Constitution relinquished any claim to the Potomac River beyond its "shores or strands," the precise location of the boundary line on the south side of the River had not been decided, with Maryland claiming under its Charter to the high water mark. The two States also disagreed about the location of the line, called for in the Maryland Charter, that extended across the Chesapeake Bay and Eastern Shore to the Atlantic. To avoid litigation over the issues, Maryland and Virginia appointed commissioners in 1872 and 1873 to negotiate a settlement of the outstanding disputes. When that effort failed, the two States turned to binding arbitration. The arbitrators issued their award on January 16, 1877, and determined the boundary to be the low water mark on the south shore of the Potomac. (App. 45a.)[10]

The arbitrators noted that while Virginia had made a "claim for a boundary on the left

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[10] References to "App." are to the appendix filed with Virginia's motion for leave to file its Bill of Complaint.

[or north] bank of the Potomac" (App. 17a), "[t]he intent of the charter is manifest all through to include the whole river within Lord Baltimore's grant." (App. 19a.) The arbitrators thus stated that "the charter was on the right bank of the Potomac, where the high-water mark is impressed upon it, and that line follows the bank along the whole course of the river, from its first fountain to its mouth . . . ." *Id.* The arbitrators concluded, however, that Virginia had acquired title to the strip of land lying between high water mark and low water mark through a long history of prescription. (App. 28a-29a.) Accordingly, the arbitrators' Award stated, among other things, that Virginia was entitled "not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership . . . ." (App. 48a-49a.) This right could not be exercised with the effect of "impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five." (App. 49a.)

Since their adoption of the Black-Jenkins Award, Maryland and Virginia have embarked and continued on a course of conduct for more than a century manifesting the belief and understanding of both States that the low-water mark boundary line represented a uniform line of sovereignty with respect to all activity occurring on Maryland's side of the line. In 1888, Maryland began the active regulation of sand and gravel mining from Maryland waters, including the Potomac. Under the common law, riparian owners had no right to mine sand and gravel from the navigable waters in front of their land. *Bostick v. Smoot Sand & Gravel Corporation*, 260 F.2d 534, 537 (4th Cir. 1958). With the advent of the mechanical dredge in the 19th century, it became possible to dredge sand and gravel from the river bed itself without the permission or knowledge of the riparian owners on the

shoreline. *Id.* In response to unauthorized dredging, Maryland in 1888 adopted a criminal statute which forbade "any person to dig, dredge, take and carry away any sand, gravel or other material from the bed of the Potomac River . . . ." 1888 Md. Laws Ch. 362 (Ex. CC-2). In 1900, Maryland created an exception to the 1888 law's blanket prohibition, making it

> lawful for any riparian owner of lands bordering on said Potomac River, or for any person or corporation with whom such owner shall have a contract in writing for the purpose, or for the agents, servants or employees of such person or corporation to dig, dredge, take and carry away sand, gravel or other material from the bed of said river opposite said lands from high water mark on the shore bordering on said lands to the outer line of the channel nearest said shore, subject to the laws of the United States relating to navigation. And provided, further, that none of the provisions of this section shall be deemed to interfere in any manner with the provisions of any law of the State of Maryland relating to the taking and catching of fish and oysters.

1900 Md. Laws Ch. 577; *see also* 1906 Md. Laws Ch. 426 (extending sand and gravel rights to riparian owners throughout Maryland). In 1958, the United States Court of Appeals for the Fourth Circuit held that the phrase "any riparian owner of lands bordering on said Potomac River" in the Maryland law was "equally descriptive of the owners of lands in Virginia as of those of lands in Maryland" and that the riparian rights of Virginia landowners were governed by the Maryland law. *Bostick v. Smoot Sand & Gravel Corporation*, 260 F.2d at 539.

The 20th century bore witness to a number of other actions substantiating the understanding of both States that the boundary line set forth in the Black-Jenkins Award represented the point at which Virginia's sovereignty ended and Maryland's began. In 1906, for example, an assistant to the Virginia Attorney General observed that the Potomac River beyond the low water mark is not Virginia territory, that Virginia had no authority to license or otherwise regulate the sale of liquor upon a vessel anchored below low water mark, and that the liquor laws of Maryland controlled because Maryland has jurisdiction over such

activity. *See* July 2, 1906 Va. Att'y Gen. 87 (Exhibit CC-8). In 1935, the Virginia Attorney General recognized the territorial limitation on Virginia's sovereignty in another context, stating to the Virginia Commissioner of Fisheries that Virginia's oyster tax did not apply to oysters taken from the Potomac River because the tax was limited to oysters taken from the river beds of Virginia, and the bed of the Potomac is not owned or leased by the Commonwealth. *See* June 21, 1935 Va. Att'y Gen. Op. 147 (Exhibit CC-9). Virginia's Attorney General later informed the Virginia Governor in the 1940s that the Commonwealth had only limited jurisdiction under the Compact over certain crimes that occur in the Potomac, that Virginia had no statute that gave it general criminal jurisdiction over the river, and that Virginia was thus unable to regulate slot machines operated on the Maryland side of the low-water mark. *See* September 1, 1944 Va. Att'y Gen. Op. 91 (Exhibit CC-10).

Virginia has expanded upon this recognition of its limited jurisdiction by stipulating in this case that, since at least 1900, its statutory laws have not provided for, and it has not exercised, general criminal jurisdiction over crimes occurring on the Maryland side of the boundary line, even crimes that occur on structures that extend from Virginia's side of the river. *See* Exhibit CC-14, ¶¶ 7, 8. Over sixty years before it made this concession, however, Virginia's Attorney General stated that Virginia could do nothing about an individual who had a Maryland license to sell beer on Sundays on a pier attached to the Virginia side of the Potomac, asserting that, even though this activity was unlawful in Virginia, the territorial jurisdiction of the Commonwealth ends at the low-water mark and does not extend to any portion of a pier built beyond the boundary line into Maryland. *See* July 13, 1948 Va. Att'y Gen. Op. 118 (Exhibit CC-11).

In 1952, the Virginia Attorney General again recognized the boundary line and the

jurisdictional line of sovereignty in expressing the view that the Commonwealth lacks the authority to license waterfowl blinds beyond its boundary in the Potomac. *See* July 30, 1952 Va. Att'y Gen. Op. 116 (Exhibit CC-12). Fifteen years following that recognition, the Virginia Attorney General concluded that filling in and construction beneath a pier also would not change the Commonwealth's lack of authority over that portion of the pier in Maryland, stating that while the rights of a riparian owner include the right to build a pier or wharf that is subject to regulation, the lawful exercise of such a right does not alter the boundary line between Maryland and Virginia. *See* April 25, 1967 Va. Att'y Gen. Op. 48 (Exhibit CC-13). Similarly, much like the stipulation concerning general criminal jurisdiction, Virginia has stipulated that since at least the turn of the last century it has not enforced any law relating to gambling, gaming, health, or occupational safety with respect to activities or structures in the river, *see* Exhibit CC-14, ¶ 10, and it has admitted in its responses to Maryland's interrogatories that, with respect to the same activities and structures, Virginia does not enforce, to this day, any laws relating either to these subjects or to alcohol, public safety, hunting or fishing. *See* Exhibit CC-15, Interrogatory Response No. 13.

Conversely, during this same time frame, Maryland has exercised the precise regulatory authority that Virginia has recognized it could not. Since 1908, Maryland law has provided that the jurisdiction of every county bounded by navigable waters extends from the shore to the inside of the channel, "except where said waters adjoin neighboring States, in which case the jurisdiction of said counties shall continue to the ultimate limits of the State at the place in question." 1908 Md. Laws Ch. 487 (Exhibit CC-3). Pursuant to this law, Maryland and its political subdivisions have asserted and extended their police power

authority to the low-water mark on the Virginia side of the river, and to piers, wharves and other structures that extend beyond the boundary line into Maryland, in virtually every conceivable way in which that authority could be exercised.

Maryland has, for example, routinely applied and enforced its criminal laws with respect to a broad range of activities occurring on Maryland's side of the low-water mark, including those that have taken place on piers and wharves attached to the Virginia side of the river. *See* Declaration of Fred Davis, Exhibit B; Declaration of Francis "Buddy" Garner, Exhibit C; Declaration of Richard Voorhaar, Exhibit C; Declaration of Dennis I. Leland, Exhibit D. Indeed, while some of those activities, specifically, slot machine gambling, were initially lawful in Maryland, they were illegal in Virginia and so Maryland prohibited such activities to accommodate Virginia's request that Maryland take action where Virginia could not. *See Miedzinski v. Landman*, 218 Md. 3, 145 A.2d 220 (1958). Maryland has also routinely issued a variety of licenses with respect to structures extending from the Virginia side of the Potomac into Maryland and activities occurring on those structures. *See* Declaration of Edward C. Papenfuse, Exhibit W; Declaration of Lisa Bailey, Exhibit K; Declaration of Patricia Insley, Exhibit L; Declaration of Janice C. DeAtley, Exhibit T; Declaration of Faye Gatton, Exhibit U; Declaration of Elinor A. Mattingly, Exhibit V; Declaration of Kenneth A. Schertle, Exhibit O; Declaration of Michael Williams, Exhibit M; Declaration of Rick Forrester, Exhibit N. Maryland has taxed those structures and activities, *see* Declaration of Robert C. Farr , Exhibit F; Declaration of James W. Spence, Exhibit H; Declaration of James Loftus, Exhibit J; Declaration of Edward Muth, Exhibit I; Declaration of Joseph W. Norris, Exhibit G; Declaration of Edward C. Papenfuse, Exhibit W; it has performed health and safety inspections, not only for activities on the piers and wharves, but

also for the structures themselves, *see* Declaration of Patricia Herriman, Exhibit P; Declaration of Ann Rose, Exhibit Q; Declaration of Walter Miles, Exhibit R; Declaration of Walter Raum, Exhibit S; and it has exercised its regulatory authority at the specific request of Virginia officials to accomplish what those officials recognized they were unable to achieve due to the jurisdictional limitations imposed on them by the low-water mark boundary line. *See* Herriman Decl., Exhibit P, ¶¶ 24-29, 33; Davis Decl., Exhibit B, ¶¶ 3-4.

The two States have accorded identical treatment to the boundary line set forth in the Black-Jenkins Award in the area of water withdrawals from and construction in the Potomac River, as they have in the other areas discussed above. Both Virginia and Maryland have recognized the boundary as the point at which Virginia's authority over the river terminates and Maryland's begins. Virginia has stipulated, for example, that "[n]either the Virginia Marine Resources Commission, nor any of its predecessor agencies has issued a permit, certification, or other authorization governing construction in the Potomac River on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 6. Similarly, the Commonwealth "has never set or enforced water quality standards with respect to the Potomac River on the Maryland side of the Maryland-Virginia line." *Id.*, ¶ 4. Likewise, Virginia has admitted that "no agency of the State government of Virginia currently requires a permit from any Virginia user to withdraw water from the Potomac River," Exhibit CC-15, Interrogatory Response No. 4; that "it has not issued or been requested to issue any licenses or permits for the withdrawal of water from the Potomac River," *id.*, Interrogatory Response No. 5, and that "it has not, to date, issued or denied any water appropriation permits with respect to the withdrawal of water from the Potomac River." Exhibit CC-16, Response to Request for Admission No. 29.

Maryland, in contrast, has long regulated the Potomac in these areas. The modern Maryland regulatory system for controlling waterway construction and water withdrawals was established in 1933. 1933 Md. Laws Ch. 526 (currently codified at MD. CODE ANN., ENVIR. ART. § 5-501 *et seq.*) ("Water Resources Law") (Exhibit CC-4). The Water Resources law established permitting systems for both water withdrawals and waterway construction in the waters of the State. Maryland issued the first water appropriation permits under the law in the 1930s. *See, e.g.*, Declaration of Matthew G. Pajerowski, Exhibit X, ¶¶ 4-5. The first application to withdraw water from the Potomac came in 1955, when the Potomac Electric Power Company (PEPCO) sought to withdraw water in connection with a power plant initially planned for the Virginia side of the Potomac in Loudoun County and then later relocated to Maryland. *Id.*, ¶¶ 6-7.

Fairfax County, Virginia was the first Virginia entity to follow through on an application for a Maryland permit. Fairfax County submitted its application in 1956 and was issued a permit on February 25, 1957, authorizing the withdrawal of up to 15 million gallons per day from the Potomac. *Id.*, ¶¶ 8-9. Four months after the Fairfax County Water Authority was created in 1957, Fairfax County requested that the Maryland permit be transferred to the Authority, which Maryland did on January 24, 1958. *Id.*, ¶ 10. Although the Authority's permit eventually lapsed for failure to initiate withdrawals, *id.*, ¶¶ 11-15, Virginia applicants continued to come to Maryland for permits during the 1960s. *Id.*, ¶¶ 16 (Great Eastern Utilities Corp.), 18 (Town of Leesburg). During this time, Virginia and its political subdivisions participated in the Maryland permit process by submitting comments on the proposed applications and, in the instance of the Town of Leesburg, asking that Maryland not grant the requested permit. *Id.*, ¶¶ 47-49.

The Fairfax County Water Authority in 1973 was the next, and most controversial, Virginia application for a Maryland withdrawal permit. The Authority's application came at a time of great concern about the ability of the Potomac to meet the water supply needs of the Washington Metropolitan Area. The Washington Suburban Sanitation Commission ("WSSC"), which serves many of the Maryland suburbs of Washington, had recently applied for a permit from the U.S. Army Corps of Engineers ("the Corps") to construct a weir across the Potomac to facilitate its withdrawal of water during periods of low flow. The Corps declined to authorize the structure unless and until an agreement could be worked out allocating the water in the river during periods of low flow. *See* Ex. CC-22 at VA-SRC-002656.

The Authority's application prompted a response from both sides of the river, with most commenters – including the Towns of Leesburg and Herndon, Virginia – expressing concern about how the Authority's withdrawal would impact their ability to use the river. Exhibit X, ¶¶ 55-57. The Commonwealth of Virginia itself supported the Authority's application and, while acknowledging that Potomac flows were not sufficient to meet all demands, expressed hope that "under the auspices of Maryland Water Resources Administration some equitable basis for allocating withdrawals during times of critical low flow can be developed." *Id.*, ¶ 58. While Maryland had already included conditions in its permits requiring permittees to reduce their use during such periods, *see, e.g.*, Exhibit X-17 (Town of Leesburg permit), the Washington Aqueduct, which was the largest user on the river, claimed exemption from Maryland's permit system. Exhibit CC-20 at VA-SRC-002724-25.

While the Authority's application was pending, the process of negotiating a low flow

allocation agreement that would require all users to reduce their withdrawals during periods of low flow began in earnest. Although Maryland and Virginia stood together through most aspects of the negotiations, the Commonwealth eventually noted "for the record" that it had not "recognized" Maryland's permitting authority over Virginia withdrawals from the Potomac. Ex. CC-21. Maryland, for its part, maintained that all withdrawals from the mainstem Potomac River in Maryland were subject to its regulatory authority, as exercised since 1933 and earlier. Exhibits CC-20 and 26.

The version of the Low Flow Allocation Agreement ("LFAA") eventually signed by Virginia, Maryland, the Corps, the WSSC, and the Fairfax County Water Authority specifically recognizes Maryland's permitting program and uses it as a means of enforcing the agreement with respect to non-signatories, which include a number of Virginia permittees. *See* Pajerowski Decl., Exhibit X, ¶ 75. All parties agreed in Article 3.C that nothing in the LFAA was meant to undermine Maryland's permitting system (App. 94a), and Virginia applicants continued to come to Maryland for both new and renewed permits, applying for them without objection or protest. In fact, since 1976, twenty-two permits have been issued to Virginia entities, Exhibit X, ¶¶ 23-45, including permits to seven new users.[11]

Maryland's regulation of waterway construction in the Potomac since enactment of the 1933 Water Resources Law follows much the same pattern as its regulation of water appropriations. In 1964, the Fairfax County Board of Supervisors applied to construct a

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[11] The Town of Lovettsville (1988, 1990, 2001), Exhibit X, ¶ 28, 31, 44; P.D. Gravett (1988), *id.*, ¶ 30; Williams/Transco Gas Pipeline (1988, 2000), *id.*, ¶¶ 29, 42; Xerox Realty (1991), *id.*, ¶ 34, Bondy Way Development Corp. (1992), *id.*, ¶ 35; River Creek Limited Partnership (1994), *id*, ¶ 36; and Lansdowne Conservancy/University Development (1996), *id*, ¶¶ 39, 43.

sanitary sewer across the Potomac in order to connect with the Potomac Interceptor sewer line near the town of Carderock, Montgomery County, Maryland. Exhibit W-35, MD-OAG-00342. In 1968, the Town of Leesburg sought a permit to construct a drinking water intake to effectuate its withdrawal of water under its Maryland water appropriation permit. Declaration of Amanda Sigillito, Exhibit Y, ¶ 3. Other Virginia political subdivisions – *e.g.*, the Fairfax County Water Authority, Northern Virginia Regional Park Authority – sought Maryland permits for water intakes and other, smaller structures. *Id.*, ¶¶ 4-20.

Maryland has issued several waterway construction permits to Virginia entities and political subdivisions since 1933 and, until the Fairfax County Water Authority's 1996 application for a mid-river that gave rise to this case, no Virginia entity, public or private, had ever questioned Maryland's authority to regulate the placement of structures in, on, or over the bed of the Potomac River in Maryland territory. *See id.*, ¶ 22. In fact, the Commonwealth has actively referred Virginia applicants to Maryland for review of non-tidal shoreline projects. *See, e.g.*, Sigillito Declaration, Exhibit Y, ¶ 26; Exhibit CC-27, VA-MRC-F-00756; Exhibits CC-32 and 33.

In 1970 Maryland enacted the Tidal Wetlands Act to regulate more closely the construction occurring on the tidewater stretch of the Potomac River. This law established a formal licensing system for obtaining the approval of the Maryland Board of Public Works for the dredging or filling of, and the placement of structures in, Maryland's tidal waters and wetlands, defined to include all the lands beneath the high water mark within the State. 1970 Md. Laws Ch. 241. On the Virginia side of the Potomac, this means Maryland regulates all structures extending beyond low water mark as established in the Black-Jenkins Award and

mapped by the Mathews-Nelson Survey.[12]

The first Maryland licenses for projects on the Virginia shoreline of the Potomac River were issued in 1971. While most of these early licenses were for dredging projects, Maryland soon licensed a number of jetties, groins, bulkheads, piers, and other similar structures. From the earliest period, Virginia referred these applicants to Maryland.[13] The Virginia Marine Resources Commission ("VMRC") – the Virginia agency charged with regulating the construction of riparian improvements on submerged lands – routinely notified Potomac applicants that it did not have jurisdiction over their projects and copied Maryland on the letter. *See, e.g.*, Ayella Decl., Exhibit BB, ¶¶ 21-23. For example, on August 19, 1985, the VMRC informed John A. Taylor, Virginia Power, that

> if your proposed project extends channelward of the mean low water you will encroach on subaqueous bottom under the jurisdiction of the State of Maryland. I recommend that you contact the Maryland Department of Natural Resources, Wetlands Permit Section, Water Resources Administration, Tawes State Office Building, Annapolis, Maryland 21401, for more information on their permitting requirements.

Exhibit BB-29, VA-MRC-00075.

In 1987, the Maryland Board of Public Works established a policy to clarify for

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[12] Prior to 1970, the Maryland Board of Public Works reviewed projects involving Maryland tidal waters and wetlands that were forwarded to it by the U.S. Army Corps of Engineers. *See, e.g.*, McDonald Decl., Exhibit Z, ¶¶ 6-9. Among those projects referred to the Board were some involving the Virginia shoreline of the Potomac. *See, e.g.*, *id.*, ¶ 9, Ex. Z-7 (minutes of Maryland Board of Public Works authorizing bulkhead and dredging project at Fairview Beach, King George County, Virginia).

[13] Virginia advised its citizens to contact Maryland for permits even before the establishment of Maryland's current licensing regime. *See, e.g.*, Exhibit CC-19 (April 20, 1967 letter from George H. Badger, Jr., Commonwealth of Virginia, Commission of Fisheries, to Mrs. E.C. Rector, advising that "since this pier will be built in part of Charles County, Maryland, no license or permit is necessary from this agency. I suggest you contact U.S. Army Engineers in Baltimore and the Maryland Department of Chesapeake Bay Affairs in Annapolis, Maryland").

Virginia riparian owners along the Potomac the types of activities that would require a formal license from Maryland. In 1994, that policy was formalized by regulation. *See* Code of Maryland Regulations ("COMAR") 23.02.04.21. Under the policy, the Commonwealth continues to refer Virginia applicants to Maryland through letters informing them of Maryland's jurisdiction.

Since the advent of the 1987 policy, most of these authorizations have come in the form of a letter from Maryland informing the applicant that the project, while under Maryland's jurisdiction, does not require the issuance of a formal wetlands license, with its attendant public hearing and notice and comment process. While the vast majority of Virginia applications are granted, on occasion authorization is denied, usually early in the process before significant resources are expended. For example, officials from the Maryland Department of Natural Resources informed representatives of the Town of Quantico, Virginia, that Maryland would not authorize a marina dredging project in the Potomac due to the presence of ecologically valuable submerged aquatic vegetation. *See* Exhibit CC-29.

According to existing records, Maryland has issued between 250 and 350 authorizations to Virginia citizens for the placement of piers, bulkheads, and other structures extending beyond the low water mark on the Virginia shore of the Potomac River. *See* Ayella Decl., Exhibit BB, ¶¶ 15-18. Maryland has located roughly the same number of letters from the Commonwealth to its citizens along the Potomac acknowledging that Maryland has jurisdiction over the construction of improvements beyond low water mark in the Potomac River. *See, e.g.*, Exhibit BB-346 (collecting VMRC referral letters not included in other exhibits). The Commonwealth continues to acknowledge Maryland's jurisdiction over the construction of riparian improvements on the Virginia shoreline of the Potomac,

even after the Supreme Court granted Virginia's Motion to File a Bill of Complaint in May, 2000. *See* Ayella Decl., Exhibit BB, ¶¶ 24-30, Exhibit BB-269 (August 1, 2001, VMRC letter advising Virginia applicant that area channelward of mean low water is subject to Maryland jurisdiction).

ARGUMENT

I. MARYLAND HAS REGULATORY AUTHORITY OVER ACCESS TO THE POTOMAC.

Maryland is entitled to the entry of summary judgment in its favor for the principal reason that the relief Virginia seeks is based on an incorrect interpretation of the Compact of 1785 and the Black-Jenkins Award of 1877. While Article VII of the Compact provides that "[t]he citizens of each state respectively shall have full property in the shores of [the] Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging," the Compact, as Virginia acknowledges, "did not determine the boundary between the States." Complaint ¶ 9. Rather than relinquish any of the rights of government, sovereignty, and jurisdiction that accompany a boundary determination, Article VII merely recognizes that Virginia citizens may exercise "the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river." The exercise of such a privilege is subject to Maryland regulatory authority because that authority is an inherent part of, and incidental to, a State's ownership of the riverbed on which the wharf or pier is to be placed, and Maryland is the owner of the Potomac, including the land underlying the river, as Virginia recognized in its own Constitution and as subsequently confirmed in the Black-Jenkins Award. Maryland has acted properly in regulating the Potomac as it has for more than two hundred years because the Compact does not address, much less in any way restrict, Maryland's broad authority over property within

its territory, which includes the power to regulate the placement by Virginia citizens of wharves and improvements beyond the low-water mark in the Maryland portion of the river.

A. This Case Is Controlled By The Presumption That Maryland Has The Right, As The Owner Of The Potomac, To Regulate Access To The River.

"The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away." *McCready v. Virginia*, 94 U.S. 391, 394 (1876). This principle is reinforced by a "strong presumption of state ownership" because "navigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). The "ownership of this land was considered an essential attribute of sovereignty," *Utah Division of State Lands v. United States*, 482 U.S. 193, 195 (1987); *see also Idaho v. United States*, 121 S.Ct. 2135, 2142 (2001) (citing cases), because "title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes. . . ." *Utah Division of State Lands v. United States*, 482 U.S. at 195. *See also Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452 (1894). Such "control over the property underlying navigable waters is so strongly identified with the sovereign power of government," *Montana v. United States*, 450 U.S. 544, 552 (1981), that "a presumption against their separation from sovereignty must be indulged. . . ." *Massachusetts v. New York*, 271 U.S. 65, 89 (1926). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. at 283-84. This presumption applies "in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself," *United States v. Oregon*, 295 U.S. 1, 14 (1935), and is applicable here, as Maryland's ownership of the river is undisputed and its right to regulate the construction of wharves and other improvements beyond the low-water

mark on the Virginia side of the Potomac is a fundamental feature of Maryland's sovereign control over the river. Virginia is unable to overcome this presumption and cannot demonstrate that Maryland divested itself of its sovereign right to regulate access to the Potomac when it ratified either the Compact or the Black-Jenkins Award.

Maryland's territorial claim over the Potomac derives from the charter granted on June 20, 1632 from King Charles I to Cecilius Calvert, Lord Baltimore. As the Court long ago recognized, that grant "in unmistakable terms included the Potomac River, . . . and declared that thereafter the province of Maryland and its freeholders and inhabitants should not be held or reputed a member or part of the land of Virginia, 'from which we do separate both the said province and the inhabitants thereof.'" *Morris v. United States*, 174 U.S. at 223 (quoting Maryland charter). While King James II in 1688 purported to give by patent to Lord Culpeper territory that also included the Potomac River, "the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never devested by any valid proceedings prior to the Revolution, nor was such grant affected by the subsequent grant to Lord Culpeper." *Id.* at 225.

Rather than claim any rights of government in the Potomac, Virginia expressly disavowed any such assertion of sovereignty in its first Constitution of June 29, 1776. Explicitly acknowledging the rights of Maryland and several other States to the territories described in the charters establishing those colonies, the Commonwealth stated that those territories "are hereby ceded, released, and forever confirmed to the people of those colonies, respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia . . . ." *Maryland v. West Virginia*, 217 U.S. 1, 23 (1910) (quoting Virginia Constitution). *See also*

Virginia v. Tennessee, 148 U.S. 503, 509 (1893) (stating that "on the 6th of May, 1776, the state of Virginia, in a general convention, with that generous public spirit which on all occasions since has characterized her conduct in the disposition of her claims to territory under different charters from the English government, had declared that the territories within the charters erecting the colonies of Maryland, Pennsylvania, North Carolina, and South Carolina were thereby ceded and forever confirmed to the people of those colonies, respectively."); *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. 543, 558 (1823). In contrast to this broad relinquishment of any claim of property, jurisdiction, government, and any other right that Virginia might have asserted with respect to the territories of all of these States, Virginia reserved only limited claims with respect to two rivers, namely, "the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon." Tidewater Exhibit 19.

While James Madison, upon learning of Virginia's broad renunciation of any rights or claims over the Potomac, wrote Thomas Jefferson decrying the Commonwealth's "entire relinquishment of the Jurisdiction" of the river, Tidewater Exhibit 34, the Maryland legislature rejected even the limited claim Virginia made with respect to the Potomac, declaring that "the state of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first to Caecilius Calvert, baron of Baltimore;" that "the sole and exclusive jurisdiction over the territory, bays, rivers, and waters, included in the said charter belongs to this state; and that the river Potowmack, and almost the whole of the river Pocomoke, being comprehended in the said charter, the sole and exclusive jurisdiction over the said river Potowmack, and also over such

part of the river Pocomoke as is comprehended in the said charter, belongs to this state. . . ." Tidewater Exhibit 20.

Thus, as the drafters of the Compact came to Mt. Vernon in 1785, the two States' claims to the Potomac conflicted only as to (1) ownership of the Virginia shore, and (2) Virginians' use and navigation of the river. Beyond the Virginia shore, Maryland's authority to exercise its "rights of property, jurisdiction, and government" was undisputed from the perspectives of both States. Given that "[t]he boundary line is the line of sovereignty," *Central Railroad Co. of New Jersey v. Mayor and Alderman of New Jersey*, 209 U.S. 473, 593 (1908), Maryland had broad powers of government over the Potomac at the time it formed the Compact with Virginia in 1785, as its "ownership of the land underlying such waters is 'strongly identified with the sovereign power of government.'" *Idaho v. United States*, 121 S.Ct. at 2142. This power included the authority to regulate the construction of wharves and other improvements in the Potomac.

While "[w]harves, quays, piers, and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times," *Dutton v. Strong*, 66 U.S. 23, 31-32 (1861), "[b]y the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished, or seized and rented for his benefit, if it is not a nuisance to navigation." *Shively v. Bowlby*, 152 U.S. 1, 14 (1894). Following the American Revolution, such activity remained, as it had been before, "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public." *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870). The "legislature" responsible for regulating

this activity is the legislature of the State that owns the riverbed, as "title necessarily carries with it control over the waters above them, whenever the lands are subjected to use." *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 452.[14] This control includes such regulation or "control over the location, erection, and use of such wharves or landings, which will prevent their being made obstructions to navigation and standing menaces of danger. . . [T]he control which the State exercises over them is such as to secure at once their usefulness and their safety." *Atlee v. Packet Co.*, 88 U.S. 389, 393 (1874). *See also Norfolk City v. Cooke*, 68 Va. 430, 434 (1876) ("These rights both at common law and by statute, are secured to the riparian owner, to erect wharves, piers, or bulk heads . . ., subject only to such general rules and regulations as the legislature may prescribe; and the only limitation upon such right is, that navigation may not be obstructed, or the rights of others be injured.").

Thus, at the time it formed the Compact with Virginia, Maryland had well-settled sovereign authority over the Potomac and the construction of wharves and other improvements in the river. *See also Dutton v. Strong*, 66 U.S. at 32 ("the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time"); *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875, 880 (1904) ("we think it well established that the right to build wharves is one which is subject to state regulation").

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[14] As set forth above and more fully below, Virginia has recognized that legislature to be Maryland's, and has on many occasions informed Virginia citizens that construction on the bed of the Potomac beyond low water mark falls within Maryland's regulatory jurisdiction. *See also* April 25, 1967 Va. Att'y Gen. Op. 48 (Exhibit CC-13) (recognizing that while the right to build a wharf or pier is subject to regulation, the lawful exercise of such a right does not change the Maryland/Virginia boundary line so as to alter jurisdiction over the sale of liquor by a restaurant built on a pier offshore Virginia).

Applying the appropriate rule of construction in cases such as this shows that Maryland's formation of the Compact retained these important powers of government.

B. The Compact Does Not Contain Any Language That Divests Maryland Of Its Right To Regulate Potomac River Access.

As the cases demonstrate, Maryland is presumed *not* to have relinquished any governmental authority over the exercise of Virginia citizens' "privilege of making and carrying out wharfs and other improvements" in the Potomac River. That presumption can be overcome only by clear, especial, or plain language to the contrary in the Compact, as Maryland's regulation of such a privilege is an essential part of its ownership of the Potomac and its "absolute right" – as the trustee for its citizens – "to all their navigable waters, and the soils under them, for their own common use, subject only to the rights surrendered by the constitution to the general government." *Martin v. Waddell*, 41 U.S. 367, 410 (1842). *See also Yates v. Milwaukee*, 77 U.S. at 504. While the Compact addressed Virginia's interest in having access to the Potomac, it did nothing to change the Potomac River's location within the State of Maryland as set forth in the original 1632 charter from King Charles I. Under the presumption and rule of construction set forth in other comparable cases, the Compact does not contain any language that strips Maryland of its governmental authority over the Potomac originating in the 1632 charter that Virginia expressly recognized in its 1776 Constitution.

In *Massachusetts v. New York*, 271 U.S. 65 (1926), for example, the Court applied a rule of strict construction in holding that Massachusetts did not acquire any title to the bed of Lake Ontario by the Treaty of Hartford, in which New York granted to Massachusetts "the Right of pre-emption of the Soil from the native Indians and all other the Estate, Right, Title and Property (the Right and Title of Government Sovereignty and Jurisdiction excepted)

which the State of New York hath" in the lake, and Massachusetts granted to New York "'all the claim, right and Title which the Commonwealth of Massachusetts hath to the Government Sovereignty and Jurisdiction' in all the lands in controversy between the two states." *Id.* at 80, 85. The Court stated that "[t]he dominion over navigable waters and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in private ownership." *Id.* at 89.

In applying that presumption and concluding that Massachusetts did not acquire private title to the bed of Lake Ontario, the Court observed that "[t]he right of Massachusetts and her grantees to use the waters of the lake was amply secured and protected by a clause of the treaty" providing that the citizens of Massachusetts shall "have and enjoy the same and equal Rights respecting the navigation and fishery on and in Lake Ontario . . . as shall from time to time be had and enjoyed by the Citizens of the State of New York." *Id.* at 88. Stating that "a grant of the soil under water in private ownership would have set material limits on the free exercise of the sovereign control of New York over navigable waters of the state and on the free use of the principal waterway of the newly settled territory," *id.*, the Court held that "all grants by or to a sovereign government as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction." *Id.* at 89.

Similarly, in upholding New Jersey's right under a compact it formed with New York to tax land in New York Bay on the New Jersey side of the boundary between the two States established by the compact, "but under the 'exclusive jurisdiction' of New York, subject to

the exclusive right of property in New Jersey," *Central Railroad Co. of New Jersey v. Mayor and Aldermen of Jersey City*, 209 U.S. 473, 478 (1908), the Court took the same approach described above, stating that "boundary means sovereignty, since, in modern times, sovereignty is mainly territorial, unless a different meaning clearly applies." *Id.* at 479. Rejecting the argument that a "different meaning does appear in the article (3) [of the compact] that gives New York exclusive jurisdiction over this land as well as the water above it," *id.*, the Court asserted "we agree with the state courts that have been called on to construe that part of the agreement, that the purpose was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article 1," *id.*, which established the boundary between New Jersey and New York. *See also United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987) (holding that the United States had not waived its sovereign interest in its navigational servitude in submerged lands when it entered into a treaty with the Choctaw Indian tribe of the sovereign Cherokee Nation conveying title to those lands); *Nicoulin v. O'Brien*, 248 U.S. 113, 114 (1918) ("And we think it clear that no limitation upon the power of [Kentucky] to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact."); *Martin v. Waddell*, 41 U.S. at 414 ("it would require very plain language in these letters-patent, to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away").

As these cases show, Virginia must point to unambiguous language in the Compact demonstrating that Maryland intended to separate, and then surrender, its right to regulate

wharves and other improvements from the bundle of other rights accompanying its ownership of the lands beneath the Potomac. *See also Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (citing well-established canon of contract construction that no sovereign power will be considered surrendered absent clear and unambiguous language set forth in "unmistakable terms") (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 548 (1837) ("[W]henever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."). *See generally United States v. Winstar*, 518 U.S. 839, 871-79 (1996). Indeed, "if the great right of dominion and ownership in the rivers, bays and arms of the sea, and the soils under them, were to have been severed from the sovereignty" and "intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language." *Martin v. Waddell*, 41 U.S. at 416.

No such appropriate terms exist here, nor does this case involve language that could be characterized as ambiguous. While "a grant by a state having plenary power to make it, of the rights and title of government and sovereignty over a specified territory, . . . carries with it, as an incident, title to lands under navigable waters," *Massachusetts v. New York*, 271 U.S. at 89, the Compact "in no way expressly referred to the riverbed, nor was an intention to convey the riverbed expressed in 'clear and especial words,' or 'definitely declared or otherwise made very plain.'" *Montana v. United States*, 450 U.S. at 554 (citations omitted). The Compact simply does not contain any language remotely suggesting that Maryland

transferred to Virginia any authority over the construction of wharves and other improvements in the Potomac. Absent such a provision, no such transfer of authority can be assumed. *See also Jefferson Branch Bank v. Skelly*, 66 U.S. 436, 446 (1861) ("[N]either the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.").

Nor does the Compact confer on Virginia citizens an unrestricted "privilege" of constructing improvements in the river. First, although Maryland clearly contemplated from the plain language of the Compact that wharves and piers would be built from the Virginia side of the Potomac, "[t]here is nothing in their presence to indicate an abandonment by the Sovereign of title to the soil. . . [R]iparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state." *New Jersey v. Delaware*, 291 U.S. 361, 375 (1934). Observing that "Article 7 gave the citizens of each State full property in the shores of the River adjoining their lands and the privilege of carrying out wharves etc., but left the question of boundary open to long continued disputes," the Court in *Smoot Sand & Gravel Corp. v. Washington Airport*, 283 U.S. 348, 351 (1931), concluded that such "private ownership does not affect State boundaries" and that the use of the word "shores" "is merely a topographical indication and imports nothing as to the sovereignty over them." *Id.* Maryland's mere recognition that the "citizens" of Virginia would have the "privilege" of building wharves and other improvements into the Potomac, like Delaware's "approval" of identical construction in the Delaware River, *New Jersey v. Delaware*, 291 U.S. at 375, gives rise to "no legitimate inference" that either Maryland or Delaware relinquished its "title to the stream up to the middle of the channel or even the soil under the

piers. The privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession." *Id.* at 376.

Second, even if an inference could be drawn that Maryland intended to give Virginia citizens (as opposed to the Commonwealth) the uncontrolled right to build wharves and piers, Maryland could not confer such a right, as "[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 453. The absence of any Compact language designed to effect a blanket surrender of Maryland's sovereignty is not inadvertent, as "the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant." *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U.S. 548, 558 (1914). *See also Stone v. Mississippi*, 101 U.S. 814 (1879); *West River Bridge Co. v. Dix*, 47 U.S. 507 (1848). *See generally United States v. Winstar Corp.*, 518 U.S. at 874 & n.20, 888-89 & nn.33 and 34.

The Compact's qualification of Maryland's regulatory authority in other respects underscores the absence of any intention to relinquish Maryland's regulatory authority over the construction of wharves and other improvements in the Potomac. For example, Article VIII expressly requires the "mutual consent and approbation of both states" in passing "laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Patowmack, or for preserving and keeping open the channel and

navigation thereof. . . ." Similarly, Article X specifically conditions the exercise of the "jurisdiction of each state over the river Patowmack" with respect to certain "piracies, crimes or offences," depending on where they occur and the citizenship of both the victim and the criminal. Conversely, Article VII of the Compact makes no reference to the laws of either State, nor does it even hint that one State rather than the other will have "jurisdiction" over the exercise of the "privilege" described in that provision. Absent such language, the rights of sovereignty remain with Maryland.

Virginia's claims fail, therefore, because the Compact imposes no restrictions of any kind on Maryland's authority, as the owner of the waters and beds of the Potomac, to subject an individual's right "to make a landing, wharf, or pier . . . to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public." *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 445-46. That authority was not unique to Maryland at the time the Compact was formed but rather is a power of all sovereign entities, as Virginia's own courts have recognized, *see, e.g., Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. at 880; *Norfolk City v. Cooke*, 68 Va. at 434, and, like any governmental power, may not be deemed relinquished "in a case in which the deliberate purpose of the state to abandon it does not appear." *Providence Bank v. Billings*, 29 U.S. 514, 561 (1830). Virginia's challenge to Maryland's assertion of authority over construction activity in the Potomac should be rejected because Maryland has not manifested in any portion of the Compact any purpose to abandon such regulatory power.

The absence of such a purpose to relinquish that authority – and the need for it to be stated in clear and unequivocal language to have any effect at all – is perhaps best understood by the history preceding the Compact's formation. While Virginia has argued previously in

this case that the boundary between the two States was in dispute as of 1785, Virginia had nine years earlier in its Constitution explicitly "ceded, released, and forever confirmed to the people of" Maryland "all the rights of property, jurisdiction, and government, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia" with respect to the territory described in the Maryland Charter, and reserved only limited navigation, access, and property claims concerning the Potomac. The presence of similar language in the Treaty of Hartford in which Massachusetts recognized New York's "Government Sovereignty and Jurisdiction" over the bed of Lake Ontario was sufficient to divest Massachusetts of title to that land, notwithstanding that Massachusetts, unlike Virginia in its Constitution, retained the significantly more sweeping "right of preemption of the soil" and "the estate, right, title and property," *Massachusetts v. New York*, 271 U.S. at 85, in the land in question. The concession made by Virginia in its Constitution, and Maryland's strongly worded response at its next legislative session challenging even the limited claim that Virginia asserted with respect to the Potomac, demonstrates that both States understood the extent of Maryland's claimed ownership and sovereignty over the river. The Compact contains no language that remotely suggests the States intended to alter this basic understanding, by simply providing that the citizens of each State would have "full property" in the shores of the Potomac adjoining their lands and the privilege of building wharves and other improvements thereon.

Even if ownership of the Potomac were in dispute at that time, despite the plain statements to the contrary made in Virginia's Constitution and the Maryland legislative session, the Compact does not strip Maryland of any regulatory authority over the exercise of access rights. Rather, the Compact did not resolve any boundary issues but only

recognized a privilege to build wharves, wherever the boundary was, without stating anything about which State could regulate the exercise of such a privilege. Thus, even if the States disagreed on the location of the boundary at the time the Compact was formed and elected to leave that question for another day, the Compact neither divests Maryland of, nor vests Virginia with, any regulatory authority. As demonstrated by the language found in Virginia's Constitution, Maryland's 1776 legislative response, the Treaty of Hartford, and other contemporaneous historical documents, *see* Rakove Aff. (Exhibit A) at 13-20, the States were well aware of the differences between the words "property, jurisdiction, government, and sovereignty." The mere recognition of a "privilege of making and carrying out wharfs and other improvements" simply does not, by itself, operate to strip Maryland of, or imbue Virginia with, any jurisdictional, governmental, or sovereign rights over the exercise of such a privilege.

Nor does such a privilege confer, as Virginia alleges in its Complaint, any unilateral and unrestricted right upon Virginia or "her riparian communities" "to withdraw water from the Potomac River. . . ." Complaint ¶ 46. First, Maryland's ownership of the Potomac River bed and waters to the low water mark confirms that Maryland has the authority to regulate the reasonable use, including the withdrawal, of water from a river within its own boundaries. Indeed, as Virginia's highest court has stated, "the navigable waters and the soil under them, within the territorial limits of a state, are the property of the state, to be controlled by the state, in its own discretion, for the benefit of the people of the state . . . ." *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. at 879. That control includes the authority to regulate the appropriation of waters within that State's boundaries. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-03 (1899) ("as to every stream within

its dominion a state may . . . permit the appropriation of the flowing waters for such purposes as it deems wise"); *see also Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-57 (1982) (recognizing State's police power to regulate water withdrawals within its boundaries, while striking down Nebraska's reciprocity requirement as discriminating against interstate commerce in appropriated groundwaters).

Second, neither Virginia nor its "riparian communities" have any riparian right to withdraw water from the Potomac. Rather, such a right belongs only to the individual property owner. Indeed, in Virginia, as in many other States, "[w]hile a riparian owner is entitled to a reasonable use of the water, he has no right to divert it for use beyond his riparian land . . . ." *Town of Purcellville v. Potts*, 179 Va. 514, 521, 19 S.E.2d 700, 703 (1942). Recognizing that "[t]he use of the waters of a stream to supply the inhabitants of a municipality with water for domestic purposes is not a riparian right," *id.* (quoting *Pernell v. City of Henderson*, 220 N.C. 79, 16 S.E.2d 449, 451 (1941) (other citations omitted), "[t]he weight of authority * * * holds a municipal corporation civilly liable for diverting the waters of a private watercourse for the purposes of a public water supply, either with or without legislative authority." *Id. See also Town of Gordonsville v. Zinn*, 129 Va. 542, 106 S.E. 508 (1921).

This rule is based on the rationale that "giving an individual the right to consume water for his domestic needs is founded upon the needs of the single individual and the possible effect which his use will have on the rights of others, and cannot be expanded so as to render a collection of persons numbering thousands, and perhaps hundreds of thousands, organized into a political unit, a riparian owner, and give this unit the right of the natural unit." *Pernell v. City of Henderson*, 220 N.C. 79, 16 S.E.2d at 451 (quoting *Farnham*, Water

and Water Rights, Vol. 1, at 611). Accordingly, "[t]here is little, if any, dissent from the generally accepted view that riparian status does not entitle a municipality to abstract stream water for distribution to its inhabitants for domestic purposes." *Oklahoma Water Resources Board v. Central Oklahoma Conservancy District*, 464 P.2d 748, 755 (Okl. 1969). *Cf. Atlee v. Packett Co.*, 88 U.S. at 394 (rejecting contention that "at any place where a riparian owner can make . . . a structure useful to his personal pursuits or business, he can, without license or special authority, and by virtue of his ownership, and of his own convenience, project a pier or roadway into the deep water of a navigable stream, provided he does it with care, and leaves a large and sufficient passway of the channel unobstructed").

While there is no riparian right to withdraw water on behalf of non-riparian owners, Maryland has long sought to accommodate Virginia's need for water. Maryland follows the "reasonable use" doctrine, which allows for any use of water – even non-riparian uses – so long as that use is reasonable and does not harm other users or the aquatic environment. *See generally* COMAR 26.17.06.02B. The evidence discussed below demonstrates that, within the Maryland system, Virginians enjoy the same rights as Marylanders and are treated similarly. The Compact does not, however, give Virginians any greater access rights than those possessed by Marylanders.

C. Post-Compact History Further Substantiates Maryland's Broad Authority Over The Potomac.

1. Contemporaneous evidence shows that Maryland retained the right to regulate.

Maryland's interpretation of the Compact also finds support in the "contemporaneous construction of it and usage under it for more than a century . . . ." *Massachusetts v. New York*, 271 U.S. at 87. Maryland's understanding that it retained the authority to regulate

wharves and other improvements in the Potomac was reflected in the law that Maryland passed just six years after the Compact was formed, in which it ceded part of Maryland's territory, which included a portion of the Potomac, to the United States for the location of the seat of the federal government. A provision of that law, which was enacted December 19, 1791, vested commissioners appointed by the President with specific licensing authority over wharves built in the Potomac, stating that they "have power to license the building of wharves in the waters of the Potomac and the Eastern Branch, adjoining the said city, of the materials, in the manner and extent, they may judge durable, convenient and agreeing with general order; but no license shall be granted to build a wharf before the land of another, nor shall any wharf be built in the said waters without license as aforesaid. . . ." *Morris v. United States*, 174 U.S. at 282 (quoting Kilty's Laws of 1791, ch. 45, § 12, attached as Exhibit CC-1).

This legislation was enacted during the same historical time period in which the Compact was formed and evinces Maryland's clear understanding that it had the right to regulate the building of wharves and other improvements in the Potomac, regardless of the side of the river on which the construction took place. The law unambiguously demonstrates that Maryland's authority existed not simply in "the Eastern Branch" on Maryland's side, but also in "the waters of the Potomac." Indeed, the law's description of the property Maryland ceded to the federal government makes plain that "the waters of the Potomac" extended to Virginia's side of the river:

> beginning at Jones's Point, being the upper point of Hunting Creek, in Virginia, and at an angle in the outlet of forty-five degrees west of the north, and running a direct line ten miles for the first line, then beginning again at the same Jones's Point, and running another direct line at a right angle with the first, across the Patowmack, ten miles, for the second line, then from the terminations of the said first and second lines, running two other direct lines ten miles each, the one crossing the Eastern Branch and the other Patowmack, and meeting each other in a point; which has since been called the Territory of Columbia.

Exhibit CC-1. *See also United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 354 (1933) (stating in a case involving the proposed construction of a wharf from the Virginia side of the Potomac "it is conceded that the bed of the river below high-water mark, where the proposed wharf is to be built, lies within the District of Columbia, and that title to it and sovereignty over it were vested in the United States by cession from the state of Maryland of the area constituting the present District of Columbia").

Maryland's understanding that it had and was transferring to the commissioners of the District of Columbia the authority to regulate the construction of wharves and other improvements was shared by the commissioners, who adopted a regulation in 1795 providing in pertinent part:

> The Board of commissioners, in virtue of the powers vested in them by the act of the Maryland legislature to license the building of wharves in the city of Washington, and to regulate the materials, the manner and the extent thereof, hereby make known the following regulations:
>
> That all proprietors of water lots are permitted to wharf and build as far out into the river Potomac and the eastern branch as they think convenient and proper, not injuring or interrupting the channels or navigation of the said waters. . . The buildings on said wharves to be subject to the general regulations for buildings in the city of Washington. . . .

Morris, 174 U.S. at 283. *See also Potomac Steam-Boat Co. v. Upper Potomac Steam-Boat Co.*, 109 U.S. 672, 675-76 (1884).

The same understanding extended to Maryland's jurisdiction over water withdrawals

from the Potomac. While there was no formal permitting system in place at the time, the regulation of water rights that occurred through the courts and the legislature took place entirely under Maryland's jurisdiction. When the United States in 1853 first sought access to the Potomac "for the purpose of bringing water into the city of Washington," it came to Maryland for authorization. *See* Acts of Congress of 1852, ch. 97, March 3, 1853 (authorizing the expenditure of funds for the project and providing that "if the plan adopted by the President of the United States should require water to be drawn from any source within the limits of Maryland, the assent of the legislature of that State should first be obtained"). Maryland agreed, passing "An Act giving the assent of the State of Maryland, to such plan as may be adopted by the President of the United States, for supplying the City of Washington with Water." 1853 Md. Laws Ch. 179. It is this law that, even today, serves as the basis for the federal government's water rights in the non-tidal Potomac.

The development of the District of Columbia water supply system highlights the same understanding by both Maryland and Virginia concerning Maryland's jurisdiction over the Potomac. In its 1853 legislation, Maryland gave its approval for all aspects of the Washington Aqueduct, including "such dams, reservoirs, buildings and other works . . . as may be necessary for the said purpose [of bringing water to the District]." 1853 Md. Laws Ch. 179, § 1. By contrast, the Virginia law passed in connection with the construction of the Aqueduct is limited to providing consent for the United States' acquisition of "land necessary for an abutment and quarries for the construction of a dam across the Potomac." 1854 Va. Laws Ch. 5.

The Washington Aqueduct project also reveals how other Maryland institutions regulated water rights in the Potomac. When the Great Falls Manufacturing Co., a Virginia

corporation, sued to press its claims to water rights in the Potomac against the Aqueduct's withdrawals, it went to the Circuit Court for Montgomery County, Maryland. *United States v. Great Falls Manufacturing Co.*, Circuit Court for Montgomery County, Maryland, *reprinted as* Sen. Doc. 42, 35th Cong., 2d Sess. (1859), Tidewater Exhibit 85. Having lost in Maryland's courts, the Company then sought to secure water rights to the Potomac in the Maryland Land Office by taking out a patent to the water within the Potomac between Conn's Island and the Virginia shore, called *Neilson's Desire*. *See United States v. Great Falls Manufacturing Co.*, 21 Md. 119 (Md. 1864). In the litigation surrounding this patent, no party questioned that Maryland had the authority and jurisdiction to patent the submerged lands beneath the Potomac. *See id.* at 123 (assertion of the United States that "[t]he right of the State originally to grant the land sought to be patented, is conceded on all sides"), 127 (assertion of the Great Falls Manufacturing Company that "[t]he title of the State of Maryland to the land at the bottom of the Potomac River to high water mark on the Virginia shore, and her right to grant portions of it not yet granted by patent or otherwise, is too firmly settled to be questioned now").

Thus, ample historical evidence shows that, from the time the Compact of 1785 was formed until Maryland and Virginia's adoption of the Black-Jenkins Award ninety years later, Maryland, the United States, Virginia and others understood that Maryland retained sweeping regulatory authority over the Potomac River.

2. Maryland and Virginia have consistently recognized the boundary set forth in the Black-Jenkins Award as an absolute line of sovereignty.

a. The Award conclusively established Maryland's ownership and authority over the river and its beds up to the low-water mark.

The Black-Jenkins Award subsequently confirmed not just Maryland's view that "[t]he boundary line is the line of sovereignty," *Central Railroad Co. of New Jersey v. Mayor and Aldermen of Jersey City*, 209 U.S. at 478, but also Virginia's understanding that Maryland's regulatory authority over the Potomac extended to the low-water mark on the Virginia side of the river. While the Black-Jenkins arbitrators determined that "Virginia has a proprietory right on the south shore to low-water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership" (App. 29a), they rejected the Commonwealth's argument that, in addition to having "rights on the river[,] . . . she acquired, or that Maryland lost, the islands or the bed of the river. . . ." (App. 30a.) In dismissing that argument and determining that the boundary between the two States was the low-water mark on the Virginia side of the river, the arbitrators also rejected the offer of settlement that Maryland had made earlier in the proceedings to draw the boundary around all of the wharves and piers built out from the Virginia side. *See* Ex. 121 to Virginia's Motion for Partial Summary Judgment. Thus, "the jurisdictional line and boundary were declared to be the low-water mark on the Virginia shore," *Morris v. United States*, 174 U.S. at 218, because Maryland's ownership of the Potomac, including the riverbed, was deemed to extend to the low-water mark, even when a wharf or pier is built beyond that point.

Although the Black-Jenkins Award did not explicitly state that the sovereign authority

flowing from Maryland's ownership of the bed of the Potomac extended to wharves and other improvements built from the Virginia side of the river, the meaning and interpretation of the Award in this regard are confirmed by the "practical construction of the boundary by the acts of the two states and of their inhabitants." *Vermont v. New Hampshire*, 289 U.S. 593, 619 (1933). Both States and their citizens have deemed the low-water mark as the boundary line of sovereignty in all respects. *See also Massachusetts v. New York*, 271 U.S. at 94 ("If any further support were required for the conclusion we reach, it is to be found in the practical construction by the two states of the Treaty of Hartford and of the grants made by Massachusetts immediately following it, and in long-continued acquiescence by Massachusetts in that construction."). The Award's subsequent interpretation by Maryland and Virginia confirm again that Maryland's ownership of the Potomac included the right to regulate Virginia's access to the river.

Since the time both States accepted the Black-Jenkins Award, and in recognition of the well-settled rule that "ownership of land under navigable waters is an incident of sovereignty," *Montana v. United States*, 450 U.S. at 551, each State for the last century and a quarter has "asserted jurisdiction on its side up to the line designated, and recognized the lawful jurisdiction of the adjoining state up to the line on the opposite side." *Virginia v. Tennessee*, 148 U.S. at 515. The conduct of both States reflect their clear understanding that, with the exception of the concurrent jurisdiction over fisheries provided for in the Compact, the boundary determination made in the Black-Jenkins Award was the dividing line of sovereignty with respect to all other areas and activities.

It did not take long for that conduct to occur. Just ten years after accepting the award, Maryland passed legislation making it unlawful for any person to dig, dredge, take, and carry

away any sand, gravel or other material from the bed of the Potomac between its mouth and the uppermost boundary line of Prince George's County, Maryland. *See* 1888 Md. Laws Ch. 362 (Exhibit CC-2). Conversely, Virginia has admitted that, although it "regulates all dredging, extraction or mining on state-owned bottomlands (submerged lands) through the Marine Resources Commission," Exhibit CC-15, Interrogatory Response No. 8, "[s]ince at least 1888, Virginia has not regulated mining, dredging, or extraction of materials from property located below the low-water mark of the Potomac River." Exhibit CC-16, Response to Request for Admission No. 162.

A substantial number of similar parallel assertions of authority/non-authority were made in the next century. From Maryland's perspective, a number of these assertions of jurisdiction derive from a Maryland law enacted in 1908 providing that the jurisdiction of any county bounded by waters that adjoined a neighboring State extended to the "ultimate limits" of Maryland "at the place in question." 1908 Md. Laws Ch. 487 (Exhibit CC-3). Since that time, Maryland and its political subdivisions have extended practically every type of police power authority that exists to the low-water mark on the Virginia side of the Potomac River, and have included within their broad regulatory sweep piers, wharves, and water intake pipes attached to Virginia, and activities that take place on structures build from the Virginia side. Conversely, as with its failure to regulate mining, dredging, or extraction activity with respect to the Potomac, Virginia has failed to exert any regulatory authority over the Potomac, subject only to the exception of the limited jurisdiction given it by the Compact of 1785 concerning fisheries and certain crimes. Indeed, the Commonwealth has not only recognized its lack of authority but has also asked Maryland to exercise its regulatory power over property and activity on the Virginia side of the river but beyond

Virginia's jurisdictional reach.

b. Taxation.

A State's "taxing power" is "one of the primary indicia of sovereignty." *Illinois v. Kentucky*, 500 U.S. at 385. Such a manifestation of a State's sovereignty has been found to be "particularly persuasive in prior cases." *New Jersey v. New York*, 523 U.S. at 792 (citing cases). Both States have long recognized that Virginia's taxation authority ends at the boundary line between the States and that Maryland's begins at that point. In response to a request for an opinion whether the Commonwealth could tax oysters taken from the Potomac River, the Virginia Attorney General more than 65 years ago responded that Virginia's "tax is confined to oysters taken from the public rocks, beds and shoals of the Commonwealth of Virginia and from oyster grounds leased by the Commonwealth. Since the bed of the Potomac is not owned by the State of Virginia and is not leased by the Commonwealth, I concur in the view you expressed in your letter that the Commission does not possess the authority to levy the tax in question upon oysters taken from the said river." June 21, 1935 Va. Att'y Gen. Op. 147 (Exhibit CC-9). This limitation is not confined to oyster taxes. Rather, as Virginia has stipulated, "Virginia has not imposed any sales or use, litter, entertainment, personal property, or income tax on activities that take place in the Potomac River, or on structures located in the Potomac River, on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 13.

Virginia has recognized a similar jurisdictional limitation with respect to the imposition of real property taxes. In its response to Maryland's interrogatories, Virginia asserts that its "localities along the Potomac River are authorized to impose a property tax on real property, structures and improvements that extend from the Virginia shore of the

Potomac River," and that the localities "are authorized to include in the value of real property subject to local taxation the value of any structures appurtenant to such property that extend beyond the low-water mark across the Virginia/Maryland line." Exhibit CC-15, Response No. 10. As shown by documents produced by those localities, however, they do not tax structures and improvements that extend beyond the low-water mark into Maryland when the structures and improvements are not simply a pier or a wharf but rather are property, such as a restaurant or tavern, that has value independent of the land in Virginia to which the structure is attached. In contrast, Maryland does tax those properties when they are on the Maryland side of the boundary.

For example, Flanagan's of Colonial Beach, Inc. is the owner of a restaurant built on a pier offshore Colonial Beach, Virginia on Maryland's side of the boundary line. The Westmoreland County, Virginia Commissioner of the Revenue in the year 2001 assessed only the land owned by Flanagan's on the Virginia shore; the Commissioner did not include the restaurant in that assessment. Exhibit CC-38. Conversely, the Department of Assessments and Taxation for Charles County, Maryland taxes the building housing the restaurant, and has been taxing this property since at least 1957. *See* Declaration of Robert C. Farr, Exhibit F, ¶¶ 15-20 and Farr Exhibits 10-14.

Similarly, the Coles Point Tavern is built on pilings and piers offshore Coles Point, Virginia. The Westmoreland County, Virginia Commissioner of the Revenue in the year 2001 assessed the land at $80,000, and the total improvements at $2,800. Exhibit CC-38. The Department of Assessments and Taxation for St. Mary's County, Maryland most recently assessed the land at $1,000, and the improvements at $84,300, and has been taxing this property since at least 1961. *See* Declaration of James W. Spence, Exhibit H, ¶¶ 3-7 and

Spence Exhibits 1-4.

Maryland has also taxed other properties extending from the Virginia side of the river dating back to at least 1952. *See* Farr Decl., Exhibit F, ¶¶ 5-14 and Farr Exhibits 1-9; Declaration of Edward C. Papenfuse, Exhibit W, ¶¶ 24–32, 38, 40-41 and Papenfuse Exhibits 17-24, 29, 31-32. Maryland was unable to locate during discovery, however, any documents showing that Virginia has ever taxed these properties, and, as stated previously, Virginia has acknowledged that it has not imposed any other taxes on any activities or structures in the Potomac on the Maryland side of the boundary line. In contrast, since at least 1951, Maryland has imposed sales, entertainment, personal property and other taxes on businesses built on piers and wharves extending from the Virginia side of the river. *See* Declaration of James Loftus, Exhibit J, and Loftus Exhibits 1-9; Declaration of Edward Muth , Exhibit I, and Muth Exhibits 1-17; Declaration of Joseph W. Norris , Exhibit G, and Norris Exhibits 1-6; Papenfuse Decl., Exhibit W, ¶ 35-37 and Papenfuse Exhibits 27-29. Virginia has also stipulated that it "has not objected to Maryland's jurisdiction to impose any" of these taxes. *See* Exhibit CC-14, ¶ 14.[15]

c. Criminal laws and their enforcement.

Maryland and Virginia have also demonstrated in the area of criminal law enforcement their same understanding that the boundary line set forth in the Black-Jenkins Award represents the line at which Virginia's sovereignty ends and Maryland's begins. In 1944, Virginia Governor Colgate W. Darden, Jr. requested the Commonwealth's Attorney

[15] Maryland has also enforced the tax obligations of these businesses by, among other means, seizing their liquor licenses or upholding the transfer of such licenses until the taxes are paid. *See, e.g.*, Declaration of Lisa Bailey, Exhibit K, ¶¶ 22-25, 39 and Bailey Exhibits 17-20, 41-44.

General, Abram P. Staples, to opine whether "the jurisdiction of the State of Virginia to enforce its criminal laws respecting slot machines extend[s] to offenses alleged to have occurred on the Potomac River." September 1, 1944 Va. Att'y Gen. 91 (Exhibit CC-10). The Attorney General responded that "the State of Virginia has no such jurisdiction." *Id.* Stating that "[b]y the Compact of 1785 between Virginia and Maryland, the territorial bounds of Virginia extend only to the low-water of the Potomac River on its southern or Virginia shore," the Attorney General declared that "[t]he consequent result is that the Potomac River lies wholly in the State of Maryland, and in the absence of any further legislative compact between the two states, the State of Virginia would have no criminal jurisdiction over the waters of the Potomac." *Id.* Acknowledging that one article of the Compact "does indeed make provision for concurrent jurisdiction of the two States over certain crimes under certain conditions," General Staples stated that "[t]his article, however, has reference only to offenses committed against the person." *Id.* Noting that "[o]peration of a slot machine is not an offense against a citizen of Virginia, but an offense purely against the State," the Attorney General concluded that "the State of Virginia has no jurisdiction to enforce the slot machine statutes on the waters of the Potomac River." *Id.* at 92.

Four years later, Virginia Attorney General J. Lindsay Almond, Jr. issued an opinion stating that Virginia has no jurisdiction over that portion of a pier built from the Virginia side of the Potomac that extends beyond the low-water mark. The issue before him was triggered by an individual's sale of beer on a pier "which is clearly fastened to the Virginia shore. . . ." July 13, 1948 Va. Att'y Gen. Op. 118 (Exhibit CC-11). Quoting from the letter of the Attorney for King George County who raised the issue, the opinion states that "[a]n ordinance in this county forbids the sale of beer on Sunday – but in Maryland it is legal."

After quoting the Virginia law that declares the boundary between the two States is the low-water mark, the Virginia Attorney General stated, "[w]hile the above section also provides that the citizens of Virginia shall have full property in the southern shores of the Potomac river and the privilege of building piers so long as navigation is not obstructed, it can be seen that the territorial jurisdiction of the Commonwealth ends at the low-water mark." *Id.* "Therefore, it is my opinion that that portion of a pier which is beyond the low-water mark on the southern shores of the Potomac River is in the State of Maryland and is not subject to the laws of the Commonwealth." *Id.*

During the same time period in which Virginia's Attorneys General issued these opinions, the Maryland General Assembly enacted legislation legalizing slot machines in Charles and St. Mary's Counties. *See* 1947 Md. Laws, Extra Session, Ch. 32; 1949 Md. Laws Chs. 417 and 678; 1951 Md. Laws Chs. 181 and 183. Due to Virginia's lack of jurisdiction over slot machine activities that occur over the Potomac and on piers that extend from Virginia beyond the low-water mark, a number of taverns and restaurants featuring slot machines were constructed on piers affixed to the Virginia side of the Potomac but on Maryland's side of the boundary line. These establishments became controversial because slot machines were unlawful in Virginia and these businesses were "extensively patronized by Virginia residents and others who resort thereto from the Commonwealth." *Miedzinski v. Landman*, 218 Md. 3, 8, 145 A.2d 220, 222 (1958).

Recognizing that Maryland had authority to regulate activity taking place on piers and wharves extending from Virginia's shore beyond the low-water mark *and* that Virginia lacked the power to control that activity, Virginia's Governor (and former Attorney General) J. Lindsay Almond, Jr. sought Maryland's assistance to prohibit the activity. In 1958,

Maryland responded by enacting very specific legislation, making unlawful gambling activity taking place on piers and wharves built over Maryland waters that could not be entered from the shores of Maryland by foot. As set forth in a case in which the owners and operators of these businesses challenged the lawfulness of this statute, "the Governor of Maryland recommended to the [Maryland] General Assembly the passage of the legislation in question, upon the formal request of the Governor of Virginia." *Miedzinski v. Landman*, 218 Md. at 8, 145 A.2d at 222. *See also* Exhibit 6 to Papenfuse Decl., Exhibit W (trial court opinion discussing same request). The Maryland Court of Appeals upheld the validity of the legislation, thus ending the slot machine activity that Virginia's Attorney General 14 years earlier stated Virginia did not have jurisdiction to regulate. A newspaper article covering that decision stated, "[f]ollowing the announcement of the Appeal Court's action, Virginia's Governor J. Lindsay Almond, Jr., said: 'While I have not seen the opinion, I feel it is a wholesome decision and I again applaud the Maryland General Assembly for taking constructive action in enacting laws to control a situation which was beyond the control of Virginia.'" The Baltimore Sun, "Court Bans River Slot Machines," October 15, 1958, Exhibit 7 to Papenfuse Decl., Exhibit W.

The slot machine controversy is just one of many examples demonstrating the manner in which the two States have recognized the boundary identified in the Black-Jenkins Award as the line marking the end of Virginia's law enforcement authority and the beginning of Maryland's. As Virginia has stipulated, "[s]ince at least 1900, Virginia's statutory laws have not provided for general criminal jurisdiction over crimes alleged to have occurred in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 7. Indeed, Virginia acknowledges that, during

the same time frame, it "has not exercised general criminal jurisdiction" over such crimes. *Id.*, ¶ 8. Virginia also stipulates that, as with the slot machine issue, it "has not objected to Maryland's exercise of its general criminal jurisdiction over" these crimes. *Id.*, ¶ 9. On the contrary, Virginia has benefitted from Maryland's exercise of jurisdiction to accomplish what Virginia's criminal jurisdiction did not enable it to do.

In *Traverso v. Commonwealth*, 6 Va.App. 172, 366 S.E.2d 719 (1988), for example, the Virginia Court of Appeals reversed a criminal defendant's murder conviction and sentence of life imprisonment and held that Virginia lacked criminal jurisdiction because the decedent's body was found in Maryland between six and seven and one-half feet from the Virginia side of the Potomac River. Maryland subsequently prosecuted and convicted the defendant of first-degree murder, and his conviction was affirmed on appeal by the Maryland Court of Special Appeals, which rejected his argument that "there was insufficient evidence to support the [trial] court's determination that the murder occurred in Maryland, so as to establish its territorial jurisdiction over the prosecution for this crime." *Traverso v. Maryland*, 83 Md.App. 389, 396, 574 A.2d 923, 926 (1990).

Virginia authorities have also recognized the boundary as the jurisdictional line at which their law enforcement authority ends with respect to crimes that occur on piers and wharves built from the Virginia side on Maryland's side of the boundary. In September of 1989, William F. Bruton, Jr., the Town Manager of the Town of Colonial Beach, Virginia, wrote a letter to the President of the Commissioners of Charles County, Maryland requesting "a relinquishing of sovereign rights over the pier by Charles County and the State of Maryland." Exhibit 1 to Declaration of Fred Davis, Exhibit B. Stating that "the Town owns a public pier which was built out into the Potomac River, many decades ago," Mr. Bruton

asserted that "[b]ecause of its location, in Maryland waters, even though it is attached to Virginia soil, the Town does not have jurisdiction over crimes committed on 80% of the structure. Our Police are not able to make arrests, even when they personally witness illegal acts taking place on the pier. This has obviously created a severe law enforcement problem in the Beach." *Id.*

The law enforcement problem that Mr. Bruton referred to in his letter related to the amount of time it would ordinarily take the Charles County Sheriff's office to respond to reports of crimes occurring on the pier. That office, like the St. Mary's County Sheriff's office and other Maryland law enforcement agencies, had long been and still is responsible for enforcing Maryland's criminal laws with respect to criminal activities occurring past the low-water mark on piers and wharves built from the Virginia side of the Potomac. *See* Davis Decl., Exhibit B; Declaration of Francis "Buddy" Garner, Exhibit C; Declaration of Richard Voorhaar, Exhibit D; Declaration of Dennis I. Leland, Exhibit E. While access to the crime scene by boat could be relatively prompt, access by car would often take much longer. The Town thus requested a transfer of sovereign authority so that it "would be able to extend its police powers over the entire pier, and take the responsibility for prosecuting all violations of the law. In return, Charles County would not be forced to drive forty miles to respond to pier problems." Exhibit 1 to Davis Decl., Exhibit B. Mr. Bruton stressed, however, that "[t]he Town is not requesting jurisdiction over any other property in Maryland waters. Private businesses are able to hire their own security and do pay taxes to Maryland for police protection." *Id.* Stating that "[w]ithout our police force, the pier ends up being a lawless area without an enforcement authority for thirty to forty minutes," *id.*, Mr. Bruton enclosed a resolution "passed unanimously by the Town Council of Colonial Beach . . . ." *Id.* at 2.

The resolution, as does Mr. Bruton's letter, affirmatively states that "Town police officers do not have jurisdiction over property which lies in Maryland, and therefore can only exercise their authority over the western one-third of the Town's own pier." *Id.* at 3. The Town Council accordingly "authorize[d] the Mayor to make a request to the Charles County Board of Commissioners and the Governor of Maryland, asking that the State of Maryland relinquish its sovereign rights over the Colonial Beach Municipal Pier." *Id.*

While the Charles County Administrator subsequently responded that Charles County did not have sovereign rights that it could relinquish, as those rights belonged to the State and so the Town of Colonial Beach needed to discuss the issue with Maryland, Exhibit CC-28, the Commissioners and Sheriff of Charles County in 1998 entered into a Memorandum of Understanding with the Town of Colonial Beach and the Colonial Beach Police Department delegating to the latter certain law enforcement authority over activities occurring on the Colonial Beach Town Pier on the Maryland side of the Maryland/Virginia boundary. *See* Exhibit 2 to Davis Decl., Exhibit B. The Commissioners and Sheriff of Charles County the following year entered into a similar Memorandum of Understanding delegating to the County and Sheriff of King George County, Virginia law enforcement authority over activities taking place on the Fairview Beach Pier, again, on the Maryland side of the Maryland/Virginia boundary. Exhibit 3 to Davis Decl.

d. Licensing activities.

Both States have also recognized that the jurisdictional dividing line set forth in the Black-Jenkins Award marks the point at which Virginia's general police power authority terminates and Maryland's starts. Responding to an inquiry made in 1906 whether Virginia could license a boat upon which alcohol was believed to be sold while on the Potomac, an

assistant to the Virginia Attorney General stated that no such licensing authority existed because the boat was anchored below the low water mark on the Virginia side of the river and thus on Maryland's side of the boundary line. "I am, therefore, of [the] opinion that the Potomac river beyond low water mark is not Virginia territory, hence this State has no legal right to impose a license for the conduct of any business carried on outside of her territory. From this it necessarily follows that this State can neither require a license to sell, or prohibit the sale of, liquor on a vessel of any kind habitually anchored below low water mark." July 2, 1906 Va. Att'y Gen. Op. 87 (Exhibit CC-8). Stating that "[t]here are agreements by compact and concurrent legislation between the States of Virginia and Maryland, as to fish and oysters, and the prosecution of certain offenses committed on the Potomac, but there is no provision as to the sale of alcohol," *id.*, the opinion concludes "that the State of Maryland has jurisdiction of this case, and the liquor laws of that State must control." *Id.*

Half a century later, the Virginia Attorney General recognized the same jurisdictional limitation in responding to a similar request concerning the scope of the Commonwealth's licensing authority over constructing waterfowl blinds on Maryland's side of the low water mark. Citing the boundary line between the States, the Virginia Attorney General in 1952 informed the Clerk of the King George County Circuit Court that "the Commonwealth of Virginia possesses no authority to regulate or license waterfowl blinds beyond the boundary and inside of the State of Maryland. Accordingly, it does not appear that you, as Clerk, have authority to issue Virginia licenses for waterfowl blinds outside of the Virginia boundary line in the Potomac River." July 30, 1952 Va. Att'y Gen. Op. 116 (Exhibit CC-12). Fifteen years after issuing that opinion, the Virginia Attorney General reiterated the Commonwealth's lack of alcohol licensing authority over a restaurant built on a pier, stating that even though the

restaurant owners contemplated filling in and construction beneath the pier, "an artificial change in the low-water mark, occasioned by an owner in the lawful exercise of his right to construct a pier, would not change the boundary line between Virginia and Maryland." April 25, 1967 Va. Att'y Gen. Op. 48, 49 (Exhibit CC-13).

Virginia's stipulations demonstrate that the same jurisdictional limitations on the Commonwealth's licensing authority that its Attorney General has recognized extend broadly to all exercises of Virginia's police powers, other than those embodied in the concurrent fisheries jurisdiction provision of the Compact. Indeed, as set forth in those stipulations, Virginia concedes that, "[s]ince at least 1900, Virginia has not enforced any law relating to gambling, gaming, health, or occupational safety with respect to any activity taking place in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 10. Virginia's interrogatory responses expand on this, stating that Virginia "does not presently enforce its laws relating to public safety, occupational safety, health, alcohol, gambling, gaming, hunting or fishing in that portion of the Potomac River that lies below the low-water mark of the Potomac River beyond the Virginia/Maryland line." Exhibit CC-15, Interrogatory Response No. 13.

Conversely, just as Virginia has recognized Maryland's exercise of its criminal law enforcement authority over piers, wharves, and activities taking place on the Maryland side of the boundary, the Commonwealth has also stipulated that "Virginia has not objected to Maryland's enforcement of any law relating to gambling, gaming, health, or occupational safety with respect to any activity taking place in the Potomac River, or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." Exhibit CC-14, ¶ 11. *See also id.*, ¶ 12 ("Virginia has not objected to Maryland's jurisdiction to issue liquor

licenses to structures located in the Potomac River on the Maryland side of the Maryland-Virginia line."). At approximately the same time that the Virginia Attorney General stated that the Commonwealth did not have authority to license duck blinds beyond the boundary line, Maryland authorities were issuing to business establishments located on piers and wharves affixed to the Virginia side of the Potomac River not simply licenses for the slot machines discussed earlier, but also trader's licenses, music box licenses, cigarette licenses, restaurant licenses, amusement licenses, dance licenses, vending machine licenses, billiards licenses, soda fountain licenses, liquor licenses, food service facility licenses, food and drink permits, and other licenses and permits. *See* Papenfuse Decl., Exhibit W, ¶¶ 2-17 and Papenfuse Exhibits 1-10; Declaration of Lisa Bailey, Exhibit K, and attached Exhibits; Declaration of Patricia Insley, Exhibit L, and attached Exhibits; Declaration of Janice C. DeAtley, Exhibit T, and attached Exhibits; Declaration of Elinor A. Mattingly, Exhibit V, and attached Exhibits; Declaration of Faye Gatton, Exhibit U, and attached Exhibits.

This licensing activity continues to the present and has expanded with the advent of new technologies. For example, since 1973, Maryland has issued licenses to sell Maryland lottery tickets to businesses built on piers and wharves adjacent to the Virginia side of the Potomac but on Maryland's side of the boundary line. *See* Declaration of Michael Williams, Exhibit M, and attached Exhibits; Declaration of Rick Forrester, Exhibit N, and attached Exhibits. One of these businesses, the Riverboat on the Potomac, actually straddles the boundary line and bears a sign a few feet from the entrance stating "Welcome to Maryland." Declaration of Rick Forrester, Exhibit N, ¶ 3. While Virginia has its own lottery and has placed lottery terminals on the Virginia side of the boundary at this facility, *id.*, ¶ 1; Declaration of Kenneth A. Schertle, Exhibit O, ¶ 9, it admits that it "has not issued licenses

to sell Virginia lottery tickets on property located below the low-water mark of the Potomac River." Exhibit CC-16, Response to Request for Admission No. 88. Maryland has also issued a license to one of these businesses to operate a Maryland off-track-betting operation. *See* Schertle Decl., Exhibit O. Virginia admits that it has not issued licenses to operate any Virginia off-track-betting operations at such businesses. Exhibit CC-16, Response to Request for Admission No. 95.

Rather than object to such exercises of Maryland's regulatory authority, Virginia governmental entities have appealed to Maryland to exercise that authority to Virginia's benefit. Since at least 1952, for example, the Charles and St. Mary's County Departments of Health have licensed and inspected food service facilities built on piers and wharves adjacent to Virginia's side of the river. *See* Declaration of Walter Raum, Exhibit S, ¶¶ 2, 3 (stating that such inspections at Coles Point Tavern date back to approximately 1952 and were a "coveted assignment"); Declaration of Walter Miles, Exhibit R; Declaration of Patricia Herriman, Exhibit P, ¶¶ 5-33 and Exhibits 1-122; Declaration of Ann Rose, Exhibit Q, ¶¶ 3-7 and Exhibits 1-24. In a letter dated August 12, 1993, the Rappahannock Area Health District of the Virginia Department of Health complained to the Charles County Department of Health that an onsite sewage disposal system located in Fairview Beach, Virginia was "not adequate to handle the sewage" that would be generated by a restaurant on the Fairview Beach Pier if the restaurant was to be open for business. "Since the restaurant is located in the jurisdiction of the Charles County Environmental Health Department, the Rappahannock Area Health District and King George County Health Department request that the restaurant not be allowed to open as long as it is connected to the onsite sewage disposal system." Exhibit 120 to Herriman Decl., Exhibit P. Virginia

agencies have also referred to Maryland other complaints about establishments regulated by Maryland. Herriman Decl. ¶¶ 25-29 and Herriman Exhibits 112-116.

e. Waterway construction activities.

Notwithstanding the claim it makes in its Complaint that the Commonwealth and its citizens have the unrestricted right to build piers and wharves from the Virginia side of the Potomac beyond the low water mark, Virginia has treated these waterway construction activities in precisely the same way it has addressed every other activity that takes place on Maryland's side of the boundary line. Virginia has not regulated this construction activity, and, in case after case, and project after project, it has referred applicants to Maryland and admitted Maryland's jurisdiction.

As was undoubtedly the case in 1785, the vast majority of waterway construction on the Potomac occurs in the tidal portion, below Washington, D.C. Owners of riparian property on both sides of the Potomac routinely seek to build wharves, docks, piers, or landings to allow for easier access to the navigable channels of the river, or bulkheads, groins, jetties, or breakwaters to protect their shoreline property against erosion. As was also the case in 1785, these activities are subject to government regulation. *See, e.g., Dutton v. Strong*, 66 U.S. at 32; *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 445-46; *Taylor v. Commonwealth*, 102 Va. at 773, 47 S.E. at 880.

In Virginia, the agency that "issues permits for all reasonable uses of state-owned bottomlands (submerged lands)" is the Virginia Marine Resources Commission ("VMRC"). *See* Virginia Response to Maryland Interrogatory No. 7, Exhibit CC-15. The VMRC "considers the effect of the proposed use on other reasonable and permissible uses of state waters and state-owned bottomlands, marine and fisheries resources of the Commonwealth,

tidal wetlands, adjacent or nearby properties, water quality and submerged aquatic vegetation." *Id.* The VMRC also regulates "all dredging, extraction or mining on state-owned bottomlands (submerged lands)." *Id.*, Response No. 8. Virginia has conceded, however, that, with respect to the submerged lands of the Potomac River, the Commonwealth follows the principle that regulatory power comes with ownership: "These [VMRC] permits are only issued for structures in the Potomac River which are within those embayments that are within the boundaries of Virginia; they are not issued for structures below the low-water mark of the Potomac River where that low-water mark is the boundary between Virginia and Maryland." Virginia's Response to Maryland Interrogatory No. 7, Exhibit CC-15. *See also* Va. Code Ann. § 28.2-1205 (stating that the VMRC has jurisdiction over all state-owned bottomlands).

In Maryland, the Maryland Department of the Environment ("MDE") regulates the dredging and filling of tidal waters and wetlands, including the placement of wharves, piers, and other structures therein. MD. CODE ANN., ENVIR. ART. § 16-202.[16] Maryland asserts jurisdiction under its Tidal Wetlands Act over all the lands beneath the high water mark within the State. In the Potomac, this means that Maryland's jurisdiction reaches all structures extending out beyond the low water mark established in the Black-Jenkins Award, as mapped by the Mathews-Nelson Survey. At all times since the enactment of the Tidal Wetlands Act, Maryland has actively regulated the placement of structures in the Potomac River beyond the low water mark on the Virginia side of the river. As reflected in Ex. BB-

[16] The Maryland tidal wetland regulatory program was transferred to MDE in July 1995. Prior to that time, the program was administered by the Maryland Department of Natural Resources.

349, Maryland has issued approximately between 250 and 350 authorizations for Virginia shoreline projects, including piers, decks, bulkheads, jetties, groins, and other exercises of the "privilege" encompassed under the Compact. It has issued authorizations to properties along the entire length of the Potomac on the Virginia side, to all varieties of applicants, public and private.

Conversely, as it has with respect to the other regulatory activities discussed earlier, Virginia has acknowledged on hundreds of occasions that Maryland has jurisdiction over construction activities taking place beyond low water mark on the Potomac. At first, in the 1970s, the VMRC acknowledged Maryland's jurisdiction by copying the Maryland Department of Natural Resources on letters to applicants informing them that, because their projects extend out beyond low water mark, they are not subject to the VMRC's jurisdiction. *See, e.g.*, Ayella Decl., Exhibit BB-17. Maryland would process the applications and determine what form of Maryland authorization, wetlands license or letter of no-objection, was appropriate. *Id.*, ¶¶ 3-10, 21.

Beginning in the 1980s, Virginia's acknowledgment of Maryland's jurisdiction became more explicit, stating, for example, in an April 6, 1982, letter to an individual who had objected to the timber groin project proposal of his neighbor, that the VMRC "would not have jurisdiction" over the project because it extended beyond the low water mark of the Potomac and that the VMRC only "has jurisdiction over all State-owned subaqueous land, channelward of the mean low water, not conveyed by special grant or compact according to law. . . . I am forwarding a copy of your letter to the U.S. Army Corps of Engineers, Baltimore Maryland District, and the Maryland Department of Natural Resources. Both of these agencies would have jurisdiction over this project." Ex. BB-346, at VA-MRC-F-

00274. Virginia continued to acknowledge Maryland's jurisdiction, and to refer applicants to the Maryland Department of Natural Resources for authorization, based on the VMRC's understanding of the boundary line as the justification for both Maryland's jurisdiction beyond low water mark and the VMRC's lack of authority over Virginia applicants who proposed building past that boundary line.[17] Indeed, in one effort to help an applicant "in understanding the agencies with jurisdiction along the shoreline of the Potomac River at Colonial Beach," the VMRC in a letter dated April 4, 1984 stated that "[i]n 1785, Maryland and Virginia signed a compact in which Maryland took jurisdiction over the subaqueous lands of the Potomac River to the mean low water mark of the Virginia shore. As a consequence, projects constructed channelward of mean low water in the Potomac River fall under the jurisdiction of the Maryland Department of Natural Resources, rather than the Virginia Marine Resources Commission." Ex. BB-346 at VA-MRC-F-00354. A more direct admission and understanding about the jurisdictional nature of the boundary line between the two States would be hard to imagine.

The Maryland Board of Public Works in 1987 adopted a "Policy Clarifying Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal

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[17] *See, e.g.*, Ex. BB-21, VA-MRC-F-00186 (November 9, 1983, VMRC letter to the King George County Wetlands Board clarifying "some misunderstanding of our relative jurisdictions" on the Potomac by stating "[u]nder the revised Wetlands Law (and your new [County wetlands] ordinance) you now have jurisdiction over the inter-tidal area of your entire shoreline. Our (VMRC) jurisdiction, on the other hand, begins at mean low water and extends channelward to the limit of State ownership of the bottom (generally the 3 mile territorial sea). However, since Maryland owns the entire Potomac River from mean low water channelward we are unable to exercise jurisdiction over projects which encroach into the Potomac. We only have jurisdiction in the tributaries along the Virginia shore. . . ."). *See also, e.g.*, Ayella Decl., Exhibit BB, ¶¶ 39-43.

Portion of the Potomac River" ("1987 Policy"). Ex. AA-11.[18] The 1987 Policy set forth the types of projects for which Maryland would require a wetlands license from the Board. Such a license was not required for piers, bulkheads, and other projects involving near-shore impacts. *See* Moore Decl., Exhibit AA, ¶ 20. These projects would typically be authorized under a "No License" letter, by which Maryland would notify the Virginia applicant that the project, while subject to Maryland's jurisdiction, did not require a Maryland license. *See id.*, ¶ 21; Ayella Decl., Exhibit BB, ¶¶ 9, 10; *see also* Ex.BB-33 at VA-MRC-00048.[19]

Notwithstanding its streamlined review of these kinds of projects, the 1987 Policy unequivocally asserts Maryland's jurisdiction over Virginia projects extending beyond the low water mark on the Virginia shoreline. *See* Ex. AA-11 at MD-BPW-000400 ("Along the Virginia shore, Maryland waters generally commence at the low water mark or exist along a line from headlands and continue offshore therefrom and therefore dredging, filling, breakwaters, jetties, and groin projects affect Maryland waters and are subject to the requirements of Maryland law.") (endnote omitted). The Policy was adopted only after it had been shared with representatives of the Virginia counties along the Potomac, the VMRC, and the VMRC's counsel, Frederick Fisher, who offered no changes. *See* Moore Decl., Exhibit

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[18] The 1987 Policy was later codified as COMAR 23.02.04.21. Moore Decl., Exhibit AA, ¶ 23.

[19] Virginia has recognized that these "No License" or "No Objection" letters, while not an actual license, are nevertheless authorizations and, as such, exercises of Maryland's regulatory jurisdiction. *See, e.g.*, Exhibit BB-83 at VA-MRC-01291 (June 20, 1992 letter from Jay M. Woodward, VMRC, to B.M. Marshall, Virginia Power, stating his understanding that Virginia Power, which had been issued Maryland "No Objection" letter No. 92-NO-1892, had "received authorization from the Maryland Department of Natural Resources, as they have jurisdiction over waters of the Potomac River below the mean low water line").

AA, ¶¶ 9-22. After Maryland's adoption of the 1987 Policy, Virginia continued to refer Virginia applicants to Maryland for piers, jetties, bulkheads and every other variety of riparian improvement. *See* Ayella Decl., Exhibit BB, ¶¶ 25-30.

In 1994, the Maryland Board of Public Works promulgated the 1987 Policy as a regulation. COMAR 23.02.04.21. The 1994 regulation continued the policy of not requiring a formal license for Virginia shoreline improvements that meet certain criteria for width, length, and coverage. *See, e.g.*, Exhibit BB-139 at VA-MRC-01026. As in the past, Virginia continued to acknowledge Maryland's jurisdiction and has continued to refer its citizens and political subdivisions to Maryland, even after the Commonwealth filed its Motion for Leave to File Bill of Complaint in this case. Ayella Decl., Exhibit BB, ¶ 29. This practice has continued more than a year after the Supreme Court agreed to review the case in May, 2000, *id.*, ¶ 30, and confirms both States' understanding – consistently followed since the Black-Jenkins Award in 1877 – that the boundary is the line of sovereignty, that Maryland's regulatory jurisdiction over the construction of wharves, piers, and other riparian shoreline improvements begins at the low water mark on the Potomac,[20] and that, if the riparian improvement crosses the boundary line, the portion lying beyond the line is within Maryland's jurisdiction, and not Virginia's.[21]

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[20] *See, e.g.*, Ayella Decl., Exhibit BB, ¶¶ 39-43; *see also, e.g.*, Ex. BB-346 at VA-MRC-02757 (March 6, 2000, VMRC letter stating: "the mean low water and mean high water line should be depicted, as this is needed to help determine jurisdictional areas between Virginia and Maryland").

[21] *See, e.g.*, Ex.BB-233 at VA-MRC-02415 (December 11, 1998, VMRC letter noting that "[a]lthough the proposed pier originates in Prince William County, Virginia, it does extend into Charles County, Maryland. Following telephone conversations with the U.S. Army Corps of Engineers in Baltimore and the Maryland Department of the Environment, I was (continued...)

The same understanding has extended to construction activity taking place in the non-tidal portion of the Potomac River. Maryland began comprehensive regulation of all construction activities that changed the "course, current, or cross-section" of the non-tidal Potomac in 1933, when the legislature enacted the first comprehensive water resources law in Maryland. 1933 Md. Laws Ch. 526 ("Water Resources Law").[22] Maryland issued a number of permits in the 1960s for pipelines, cables, and other utility crossings of the Potomac River. Maryland issued the first waterway construction permit for work occurring solely on the Virginia side of the non-tidal Potomac in 1968, when the Town of Leesburg sought to construct a drinking water intake extending beyond the low water mark, Ex. Y-1, and has issued dozens of permits for construction on the Virginia side to Virginia applicants for both large and small projects ever since. *See* Sigillito Decl., Exhibit Y, ¶¶ 3-20.

There is no evidence that, prior to the Authority's 1996 application for its second mid-river intake, any of the Virginia applicants ever submitted their applications under protest or otherwise claimed that Maryland did not have jurisdiction over the project. *Id.*, ¶ 22. Nor did the Virginia entities that participated in the Maryland permit process for these projects claim that Virginia alone could regulate the projects at issue or that Maryland did not have jurisdiction over such activity. On the contrary, Virginia has agreed, as it has with respect

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[21] (...continued)
advised to forward a copy of the attached permit application directly to Ms. Andi Cunabaugh at the Maryland Department of the Environment for their review").

[22] Although the 1933 Water Resources Law established the first comprehensive regulatory program for waterway construction, Maryland prior to 1933 nevertheless regulated dams and bridges under earlier legislation. *See, e.g.*, 1853 Md. Laws Ch. 179 (assenting to the United States' construction of a dam across the Potomac to supply the District of Columbia with water); 1876 Md. Laws Ch. 242, § 21 (requiring the approval of the Maryland Board of Public Works for all railway bridges across the navigable waters of the State).

to the tidal Potomac, that Maryland has regulatory jurisdiction over construction extending beyond the low water mark on the non-tidal Potomac. For example, in 1979, the Virginia State Water Control Board ("SWCB") referred the Northern Virginia Regional Park Authority – itself a political subdivision of the Commonwealth – to Maryland for review of the Park Authority's proposed boat ramp. The SWCB stated that "[w]hile the work you have described will take place on the Virginia shoreline, any work done in the waterway will take place in the Potomac River and will be under the jurisdiction of the State of Maryland." Exhibit CC-27, VA-MRC-F-00756. The Park Authority subsequently applied for and obtained a Maryland waterway construction permit. Sigillito Decl., Exhibit Y, ¶ 10.

In fact, the Virginia Department of Health and the VMRC have both stated unequivocally that the Fairfax County Water Authority's mid-river intake – the very waterway construction that gave rise to this case – was beyond Virginia's jurisdiction because it extended into Maryland territory. The Department of Health, writing to the Authority on January 24, 1994, stated that:

> We have received your letter and sketches on the proposed mid-river intake and have no objections to this proposal. While no further formal permitting requirements are necessary for this type of project since the modifications or new construction will be located in Maryland, we request the opportunity to see the final plans and design information prior to the start of any construction.

Ex. CC-32. Two years later, the VMRC put a finer point on it:

> You have inquired regarding a permit to construct a 120,000 square foot concrete intake structure to withdraw water from a nontidal portion of the Potomac River upstream of Seneca Dam in Loudoun County, Virginia, and Montgomery County, Maryland.
>
> Please be advised that your proposed project does not fall within the jurisdiction of the Marine Resources Commission; therefore, no authorization will be required from this agency.

> Your project will, however, encroach on subaqueous bottom under the jurisdiction of the State of Maryland. They have been forwarded a copy of your application and the archeological investigations report and will contact you if further authorization is required.

Ex. CC-33 (emphasis added).

Virginia's repeated admissions that Maryland, and not Virginia, has jurisdiction over construction occurring in the Potomac River beyond the low water mark on the Virginia side simply cannot be squared with the claims it now makes in this case.

f. Water appropriation activities.

The regulation of water withdrawals from the Potomac is another context in which both States have recognized that the boundary line established by the Black-Jenkins Award represents the point at which Virginia's territorial sovereign jurisdiction terminates and Maryland's starts. Subject to a brief time period discussed below, both States have understood that it has been Maryland, and not Virginia, that has regulated the withdrawal of water from the Potomac since the Black-Jenkins Award of 1877. Indeed, Virginia concedes that, to this day, it has never implemented an administrative system for regulating the withdrawal of water from the Potomac River. *See* Exhibit CC-15, Virginia Interrogatory Responses 4 and 5. By contrast, Maryland has regulated water withdrawals from the Potomac since 1933, when it established the first and only formalized water appropriation permitting system in use on the Potomac River.

Ironically, while Virginia now claims the right to withdraw water from the Potomac River without submitting to Maryland's authority, a political subdivision of the Commonwealth, Fairfax County, was among the first to apply for, and obtain, a Maryland permit to engage in that activity. Fairfax County submitted its application on October 10, 1956, without protesting Maryland's authority to require a permit or otherwise contesting

Maryland's jurisdiction. Pajerowski Decl., Exhibit X, ¶ 8. The Maryland Department of Geology, Mines and Water Resources issued the permit on February 25, 1957, and it was accepted by Fairfax County on March 22, 1957. *Id.*, ¶ 9.[23] Thus, while the regulation of water withdrawals was a fairly new phenomenon in the 20th century, Fairfax County's submission to Maryland's regulatory authority in this area was another example of how widely all parties understood that the boundary line represented the line of sovereignty for all purposes.

That understanding has continued through the present. Virginia entities have on at least 29 occasions applied for and obtained Maryland permits to withdraw water from the Potomac. *Id.*, ¶¶ 9, 16, 17, 18, 20-44. As with Fairfax County four decades earlier, not one of these Virginia applicants contested or in any way objected to Maryland's jurisdiction. *Id.*, ¶ 45. On the contrary, throughout the forty-plus years since Fairfax County first applied in 1956, Virginia and its political subdivisions actively participated in the Maryland permit process by submitting comments on proposed applications and stating their position.[24]

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[23] The Water Resources Commission administered the water appropriation permitting system from its inception in 1933 to 1941, when its responsibilities were transferred to the newly created Department of Geology, Mines and Water Resources. In 1964, the water appropriation program was transferred to the newly created Department of Water Resources, which administered the program until 1969. In 1969, the Department of Water Resources was incorporated into the Department of Natural Resources as the Water Resources Administration, which continued to administer the water appropriation program until 1995, when responsibility for the program was transferred to MDE, which incorporated the Water Resources Administration as the Water Management Administration.

[24] For the most part, Virginians supported Virginia applications. *See, e.g.*, Pajerowski Decl., Exhibit X, ¶¶ 58-61. Sometimes, however, the support was conditional. *See, e.g., id.*, ¶¶ 55-57 (Towns of Leesburg and Herndon support FCWA's 1974 application only on condition that withdrawal will not impede Towns' water use). In some cases, Virginia commenters urged Maryland to use its regulatory power to solve water use and development conflicts

(continued...)

Moreover, all of this occurred with the knowledge of the Virginia Governor and the SWCB. The Office of the Virginia Governor reviewed the Town of Leesburg's application for financial assistance for its Potomac River Water Supply Project and supported the "essential project," Ex. X-50 at MD-MDE-13085-10, noting in another letter that "[n]o conflict was found to exist at the State." Ex. X-49 at MD-MDE-13085-08.[25] The SWCB also received notification of permit applications as a matter of routine, *see, e.g.*, Ex. X-47, and took part in many of the more significant permit actions.[26] Indeed, the SWCB played an active role in the Fairfax County Water Authority's 1974 application, and did so in a manner that reinforced the validity of Maryland's regulatory authority. After noting the allocation crisis in the Potomac and expressing hope that "under the auspices of Maryland Water Resources Administration some equitable basis for allocating withdrawals during times of critical low flow can be developed for all users of this vital water resource," Exhibit X-54 at MD-MDE-13122-27, the SWCB advised Maryland that "we support Fairfax County Water Authority's application for a withdrawal permit, and request that you act favorably on its application." *Id.* at MD-MDE-13122-28. At one point, a member of the Board, R.V. Davis,

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[24] (...continued)
within the Virginia interior. *See, e.g., id.*, ¶ 47 (Loudoun County Sanitation Authority urging Maryland not to grant the 1968 Leesburg permit on the grounds that Leesburg would supply water to customers outside of the town limits, thereby taking customers from the LCSA and eroding the customer base over which the Authority could spread the cost of "the orderly development of a county-wide water and sewerage sytem").

[25] There is even evidence suggesting that Virginia Governor Mills Godwin contacted Maryland Governor Spiro Agnew concerning the status of the Leesburg permit process in 1968. Pajerowski Decl., Exhibit X, ¶ 51.

[26] For example, the SWCB weighed in on Leesburg's application, addressing concerns raised by Prince George's County, Maryland, concerning the Town's wastewater discharges on the Potomac. Ex. X-47 at MD-MDE-13089-01; *see also, e.g.*, Ex. X-54.

even contacted Herbert Sachs, Director of the Water Resources Administration, requesting that the Authority's permit be issued to the Commonwealth itself, instead of the Authority. Exhibit CC-17, Deposition of Herbert M. Sachs, at 110-111.

It was not until 1976 and the negotiations that led to the Low Flow Allocation Agreement of 1978 ("LFAA") that the Commonwealth, through the SWCB, first raised any concerns whatsoever to the application of Maryland's permit process to Virginians. Virginia's concerns initially arose out of the introduction of H.R. 12215, which mandated the negotiation of a low flow allocation agreement as a condition of federal approval of WSSC's long-delayed weir but did not include Virginia as a party to the negotiations. *See* Ex. CC-22 at VA-SRC-002654-55. Later, the Commonwealth objected to the Corps's insistence that the allocation of low flows be based on existing levels of withdrawals, because no Virginia entity had actually begun withdrawing water, with the result that Virginia would effectively be shut off from the river during low flows. Ex. CC-24. Maryland and Virginia eventually came to terms on Virginia's participation in the agreement, Exhibit CC-23, but in the course of their negotiations, Virginia noted "for the record" that it "has not recognized the Maryland permit and appropriation authority" over the Potomac. Exhibit CC-21. Maryland, for its part, continued to assert that its permitting authority extended to the use of the Potomac by any person or entity, from either side of the river. Exhibits CC-20 at VA-SRC-002724; CC-26.

The LFAA that both States subsequently signed specifically recognized the Maryland permitting system by including a clause stating that "the State of Maryland has enacted an appropriation permit statute which requires that all non-exempt jurisdictions obtain a permit from the Water Resources Administration of the State's Department of Natural Resources

(hereinafter called 'the Administration') to appropriate and use the water of the Potomac River" (App. 79a),[27] and stating further in Article 3.C that "[n]othing herein shall restrict or limit such authority as the Administration may properly have to issue permits or impose low flow allocation requirements upon any other water appropriating permittee withdrawing water from other segments of the Potomac River, or to enforce provisions of its permits in the subject portion of the Potomac River . . . ." *Id.* Indeed, Article 3.E of the LFAA puts all new users – Virginians and Marylanders alike – to a choice: achieve compliance with the low flow provisions either by becoming signatories to the agreement or by obtaining an appropriation permit that contains the agreement's low flow provisions. (App. 94a.) For the four new Virginia users withdrawing water from the portion of the Potomac governed by the LFAA[28] – the Northern Virginia Regional Park Authority, P.D. Gravett, the Williams Gas Pipeline Corp., and the Bondy Way Development Corp. – it is their Maryland permit that alone achieves compliance with the LFAA. Pajerowski Decl., Exhibit X, ¶ 75.

As with other exercises of Maryland regulatory authority over the Potomac, Virginia and its citizens have benefitted from the manner in which Maryland has regulated water withdrawals. Indeed, it is only through the Maryland permitting system that the Fairfax County Water Authority and other Virginia municipal users can legally withdraw Potomac River water for use on non-riparian land. As discussed previously, Virginia law does not

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[27] Such "non-exempt jurisdictions" included several Virginia entities that had already applied for and obtained water appropriation permits under the Maryland law – the Fairfax County Water Authority, Leesburg, and the Northern Virginia Regional Park Authority. Pajerowski Decl., Exhibit X, ¶¶ 18, 20, 22.

[28] Article I.A.1 of the LFAA defines that portion as the part of the River between Little Falls and "the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland." (App. 82a.)

permit a municipality to divert water in such a manner. *See Town of Purceville v. Potts* 179 Va. at 521, 19 S.E.2d at 703. Under the Virginia system of water law, the Fairfax County Water Authority could not legally provide water for municipal use throughout its service area because its service area is not itself riparian to the Potomac. *See* Ex. X-53 at MD-MDE-13122-30 (Authority official J. Corbalis stating at Maryland public hearing that the Authority's options were limited by "the Virginia law which forbids diversions of water from one stream to another").

Maryland, by contrast, employs the "reasonable use" variation of riparian water law, under which any use is allowed provided that it is reasonable. COMAR 26.17.06.02B. A variety of factors determine reasonableness, including the impact of the use on other users and on the aquatic environment, COMAR 26.17.06.05A(2), B, but the non-riparian use of the water is not prohibited, as it is in Virginia. As a result, the Town of Leesburg and the Fairfax County Water Authority have been able, as have the WSSC and the City of Rockville, to use Maryland law to provide water without regard to the parcels on which it is to be used.

Virginia has thus recognized and received the advantages of the Maryland permit program, and has chosen to agree to Maryland's "continued operation of the permit system in the interest of the riparian owners on both sides of the River." Ex. CC-25. Manifesting their understanding that Maryland has unqualified jurisdiction over the Potomac even after the initiation of this litigation, Virginia political subdivisions have continued to acknowledge that Maryland has jurisdiction over the withdrawal of water from the river, including Fairfax County, which represents to the public, as it did almost twenty years ago, that "[t]he State of Maryland has jurisdiction over the withdrawal, appropriation and use of water from the

Potomac River and regulates all users, including the Authority." Ex. CC-37. *See also* Ex. X-58 at MD-MDE-13122-11 (September 1973 statement of Fairfax County Water Authority that the "[Maryland Water Resources] Administration has the authority to make allocations of Potomac River water among the users"); Ex. X-56 at MD-MDE-13132-16 (July 16, 1973 resolution passed by Fairfax County Board of Supervisors noting the Authority's application to "the State of Maryland which has jurisdiction over the upper Potomac").

These statements and actions are consistent with numerous others that have preceded them. Indeed, at the same time Maryland asserted its authority over Fairfax County's request to withdraw water from the river in 1956, Virginia conceded in the 1958 Compact that "Maryland is the owner of the Potomac River bed *and waters* to the low water mark of the southern shore thereof" (App. 60a) (emphasis added), and the 1958 commissioners concluded that Virginia's access rights under Article VII of the Compact of 1785 "have not been in controversy." (App. 58a.) Virginia's newly made assertion in its complaint in this case that "Maryland does not own the water in the River," Complaint ¶ 46, is simply belied by a well-documented history in which Virginia, its political subdivisions, and its citizens repeatedly manifested a completely contrary understanding concerning Maryland's jurisdiction over the Potomac.

In sum, since the Black-Jenkins Award drew the boundary line at the low-water mark on Virginia's side of the Potomac, both Maryland and Virginia have recognized that boundary line as the line of sovereignty in all respects. Maryland has exercised authority over property and activities located on wharves and piers extending from the Virginia side of the Potomac onto Maryland's side of the boundary line, by subjecting that property and those activities to permitting, taxing, licensing, policing, public safety, health, gambling, and

other regulatory actions. In contrast, Virginia has not engaged in such regulation, has not objected to Maryland's regulation and, in many instances, has recognized, participated in, and aided Maryland's regulation. Virginia's belated and *post hoc* interpretation of the Black-Jenkins Award should be rejected because the "longstanding assumption of jurisdiction" described above "not only demonstrates the parties' understanding . . . but has created justifiable expectations which should not be upset . . . ." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977).

II. VIRGINIA HAS ACQUIESCED IN MARYLAND'S ASSERTION OF AUTHORITY OVER THE POTOMAC.

Maryland's authority over the Potomac River is supported by the additional and independent reason that Maryland has long exercised regulatory authority over the river without any objection from Virginia. "The rule, long settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926). Accordingly, even if the Compact and the Black-Jenkins Award had given Virginia citizens access rights to the Potomac without the need to submit to Maryland's regulatory authority, "[i]ndependently of any effect due to the compact as such, a boundary line between the states or provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant." *Virginia v. Tennessee*, 148 U.S. at 522. *See also California v. Nevada*, 447 U.S. 125, 131-32 (1980); *Ohio v. Kentucky*, 410 U.S. 641, 649-52 (1973); *Vermont v. New Hampshire*, 289 U.S. at

613-20; *Michigan v. Wisconsin*, 270 U.S. at 306-08, 316-19; *Maryland v. West Virginia*, 217 U.S. at 40-46. Maryland and Virginia's longstanding treatment of the Black-Jenkins boundary as the line of sovereignty for all purposes is conclusive and bars Virginia's claims in this case.

While the Court has applied these principles in a number of cases, it has almost always done so for the purpose of establishing the boundary line between the States that are parties in those cases. *See, e.g., Illinois v. Kentucky*, 500 U.S. 380, 384 (1991) ("Although Kentucky has styled its acquiescence claim an affirmative defense, this 'defense,' if successfully proved, would not only counter Illinois' boundary claim but also establish Kentucky's own position."); *Georgia v. South Carolina*, 497 U.S. 376, 389 (1990) ("Georgia's argument is essentially this: long acquiescence in the practical location of an interstate boundary, and possession in accordance therewith, often has been used as an aid in resolving boundary disputes."); *Arkansas v. Tennessee*, 310 U.S. 563, 569 (1940) ("The contentions of Arkansas in opposition to the application of the principle of prescription and acquiescence in determining the boundary between States cannot be sustained."); *Maryland v. West Virginia*, 217 U.S. 1, 42-43 (1910) ("[T]here is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.") (quoting *Rhode Island v. Massachusetts*, 4 How. 591, 639 (1846)). As between Maryland and Virginia, the boundary was resolved more than 120 years ago and is not an issue in this case.

The Court has also applied the doctrine of prescription and acquiescence in resolving rival claims of sovereign authority over land, *see New Jersey v. New York*, 523 U.S. 767, 786-806 (1998), and the preceding discussion demonstrates that Virginia for more than a

century has treated the boundary between the States as an absolute line of sovereignty that has not been subject to any of the exceptions the Commonwealth now asks the Court to declare. Indeed, even after Virginia filed this suit asserting the right to build piers, wharves, and water intake pipes in the Potomac without submitting to Maryland's regulatory authority, its agencies and officials have continued to recognize that Virginia has no jurisdiction over construction activity that extends from the Virginia side of the river past the low-water mark. *See* Ayella Decl., Exhibit BB, ¶¶ 29-30. Virginia has informed its citizens in these circumstances, not that they must seek permission from Maryland to engage in this activity because they will risk criminal or civil sanctions if they do not, but rather that "since your proposed project will extend channelward of the mean low-water mark, you will encroach on subaqueous bottom under the jurisdiction of the State of Maryland." Exhibit BB-269 at VA-MRC-02640 August 1, 2001 letter).[29]

Virginia's discovery responses confirm that the Commonwealth long ago acquiesced in Maryland's broad assertion of sovereignty over the Potomac and specific regulation of Virginians' access to the river. In response to Maryland's Request for Admission No. 16 that "[p]rior to the events that led to the filing of this lawsuit, Virginia has recognized that Maryland may properly exercise regulatory authority over activities occurring below the low-water mark of the Potomac River, including activities of Virginia citizens, residents and

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[29] Nor is the Commonwealth alone in its understanding that Maryland's jurisdiction over shoreline improvements begins at low water mark on the Potomac. The same understanding is shared by Virginia's counties, *see, e.g.*, Ex. CC-30 (King George County), and its towns, *see, e.g.*, Ex. CC-35 (Town of Colonial Beach), as well as the Corps. *See* Exs. CC-31, CC-34 (1993 and 1998 federal Regional Permits issued pursuant to 33 U.S.C. § 1344(e) stating that "[t]hose activities on the Potomac River extending beyond the mean low water line may need authorization by the Maryland Department of Natural Resources").

entities," the Commonwealth stated "Virginia admits that it does not dispute Maryland's authority to exercise certain police powers in the Potomac River on its own side of the Virginia/Maryland line, provided that the exercise of such powers does not interfere with Virginia's federal common law or interstate compact rights." Exhibit CC-16.[30] While Virginia denies "it has recognized that Maryland may require that Virginians obtain water appropriation or waterway construction permits as a condition of withdrawing water from the Potomac River, or building improvements appurtenant to the Virginia shore of the Potomac River," *id.*, Virginia long ago acquiesced in Maryland's authority to regulate the Commonwealth's purported "federal common law or interstate compact rights," including any rights Virginia claims to have to pursue waterway construction or appropriation activities in the Potomac.

Although the Commonwealth in one instance argued before the Court of Appeals of Maryland one hundred and forty years ago that the "privilege" set forth in the Compact to build wharves and other improvements "surrendered in favor of Virginia her power to tax the property within her chartered limits on that shore, and all improvements projected therefrom," *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. 1, 9 (1861), Virginia never renewed that argument after it accepted the Black-Jenkins Award, even though since that time Maryland officials have engaged in a number of taxation and

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[30] *See also id.*, Virginia's Response to Requests for Admission Nos. 17 (same admission in response to request for admission that "[s]ince at least 1878 and prior to the events that led to the filing of this lawsuit, Virginia has recognized that Maryland may properly exercise regulatory authority over activities occurring below the low-water mark of the Potomac River""); 18 (same admission in response to request for admission that "[s]ince at least 1934 and prior to the events that led to the filing of this lawsuit, Virginia has recognized . . ."); 19 (same admission in response to request for admission that "[s]ince at least 1958 and prior to the events that led to the filing of this lawsuit, Virginia has recognized . . .").

other regulatory activities with respect to property built from the Virginia side of the river, and, as discussed earlier, the documentation for those activities dates back at least fifty years. Indeed, rather than contend anew that Virginia has power and authority over improvements projecting from its side of the Potomac River, Virginia's Attorney General a century later acknowledged the opposite in responding to an inquiry concerning the Commonwealth's jurisdiction over the use of alcohol at a restaurant built on a pier attached to Virginia, stating that even though "[t]he rights of a riparian owner . . . include the '. . . right to build a pier or wharf out to navigable water, subject to any regulations of the State,'" the "lawful exercise" of such a right "would not change the boundary line between Virginia and Maryland." April 25, 1967 Va. Att'y Gen. Op. 48, 49 (quoting *Thurston v. Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965)) (Exhibit CC-13). At the same time, Maryland's Attorney General expressed the view that the Compact of 1785 "does not in any way detract from Maryland's right to levy taxes against improvements located in the River beyond the low watermark," even "when those improvements were made to shore properties on the Virginia side of the river." February 3, 1956 Md. Att'y Gen. Op. 335, 336 (Exhibit CC-6).

Maryland has accordingly long "infringed" Virginia's newly alleged federal common law or interstate compact rights, without any objection from the Commonwealth, *see* Exhibit CC-14, ¶¶ 9, 11, 12, 14, by regulating what Virginia's Attorney General long ago claimed is "Virginia property, or property attached to the Virginia shore" that, according to his interpretation of the Compact, is "exempt" from the "power of Maryland." *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. at 9. Maryland's exercise of that power is a fundamental aspect of its sovereignty over this property and, as stated in *New Jersey v. New York*, 523 U.S. at 792, "the kind of evidence of prescription that we have found

particularly persuasive . . . ." *See also Georgia v. South Carolina*, 497 U.S. at 392-93 (citing as evidence of South Carolina's "sovereignty by prescription and acquiescence" "[t]he South Carolina grant in 1813, the almost-uniform taxation of the property, the South Carolina seizure and subsequent sale for unpaid taxes, policing and prosecutorial activities by South Carolina authorities, patrolling by South Carolina wildlife officers, and other factors"); *Arkansas v. Tennessee*, 310 U.S. at 567-68 (discussing similar evidence); *Louisiana v. Mississippi*, 202 U.S. 1, 54-55 (1906) (same).

This evidence of Virginia's acquiescence is insurmountable when considered with the repeated exercises of Maryland regulatory authority that, as discussed above, Virginia has not challenged and, indeed, has readily accepted at the same time it acknowledged it did not have such authority. If Virginia truly believed that its citizens had a common law or interstate compact right to build a wharf or other improvement beyond the low-water mark without submitting to Maryland's regulatory authority, then the Commonwealth would not have spent at least the last 34 years informing its citizens that it has no jurisdiction over that activity, that the activity does not change the boundary line between the States, and that the activity will encroach upon the Potomac River bottom under the State of Maryland's jurisdiction. Similarly, the Commonwealth would not have conceded, as it has since at least the 1940s, that its criminal laws do not extend to that portion of a Virginia-based pier or wharf beyond the low-water mark, but that Maryland's do. Nor would Virginia have failed to enforce, since at least 1900, a number of its other laws with respect to piers, wharves, and other structures extending from the Virginia side of the Potomac beyond the low-water mark, *see* Exhibit CC-14, ¶¶ 6-8, 10, 11, that Maryland authorities, in contrast, have comprehensively regulated. The Commonwealth's sudden attempt to reverse course,

following its "long continued failure . . .to assert any dominion over the . . . river" and its "long acquiescence in the dominion asserted there by" Maryland, *Vermont v. New Hampshire*, 289 U.S. at 613, "is of substantial weight in indicating acquiescence . . . in the boundary line restricting her jurisdiction to the river at the low-water mark." *Id.* at 616.

A State's failure to assert authority in circumstances like these is significant. *See also Indiana v. Kentucky*, 136 U.S. 479, 510 (1890) ("Such acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome except by the clearest and most unquestioned proof."). The Court has also declared, in determining whether one State has acquiesced in another's exercise of such authority, "we are concerned not only with what its officers have done, but with what they have said, as well." *Illinois v. Kentucky*, 500 U.S. at 386. As set forth above, the Attorney General and other officials of the Commonwealth have stated on several hundred different occasions, in a variety of contexts, that Virginia's jurisdiction over the Potomac ends at the low-water mark, that the Commonwealth does not have authority beyond that point over activities or piers and wharves, that the exercise of the right to construct such improvements does not change the boundary line between the two States, and that Maryland has jurisdiction over the river because Maryland owns the Potomac. In reliance on these statements, Virginia's citizens and political subdivisions have turned to Maryland seeking permission to erect piers, wharves, jetties, and other structures from the Virginia side beyond the low-water mark into Maryland, they have asked Maryland to allow them to withdraw water from the river, and the Governor of Virginia requested his Maryland counterpart to sponsor legislation outlawing activity taking place on piers and wharves that the highest law

enforcement official in the Commonwealth stated was beyond Virginia's reach. This evidence underscores Maryland's sovereignty over the activities that Virginia now claims it may engage in without seeking Maryland's permission.

This evidence is also relevant not simply to show "the conduct of the states," but also to cast light on "the belief of the people concerning the purpose of the boundary line . . . ." *Maryland v. West Virginia*, 217 U.S. at 44. As the Court has recognized, "the belief of the inhabitants of disputed territory . . . is 'of no inconsiderable importance.'" *New Jersey v. New York*, 523 U.S. at 798 (quoting *Handly's Lessee v. Anthony*, 5 Wheat. 374, 384 (1820)). As discussed above, for years Virginians have applied to Maryland for permission to build piers and other structures beyond the low-water mark, filed with Maryland courts and agencies deeds and other documents relating to property extending from the Virginia side of the river into Maryland, paid taxes on improvements built on structures extending into Maryland, requested law enforcement assistance from Maryland officials with respect to activities taking place on such structures on Maryland's side of the boundary, and complied with a broad array of licensing requirements in areas as diverse as alcohol consumption to gambling activities to restaurant health inspections to water withdrawals. These facts, at a minimum, have "some persuasive force in showing that inhabitants along the questioned boundary considered that it extended along the river at low-water mark," *Vermont v. New Hampshire*, 289 U.S. at 615, in a consistent and uniform manner, and did not believe that piers, wharves, or water intake structures attached to the Virginia side of the Potomac were exempt from Maryland's regulatory authority. *See also Arkansas v. Tennessee*, 310 U.S. at 567-68; *Michigan v. Wisconsin*, 270 U.S. at 306-07; *Maryland v. West Virginia*, 217 U.S. at 40-41, 44; *Virginia v. Tennessee*, 148 U.S. at 515-16, 527.

While "no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription," *New Jersey v. New York*, 523 U.S. 789 (quoting 1 L. Oppenheim, International Law § 242 at 456-57 (H. Lauterpacht 5th ed.1937)), the Court stated, in addressing the conduct of the United States and the Delaware Indians who each claimed up to a boundary line established by a survey, that "[i]n the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years, could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case. . . ." *United States v. Stone*, 69 U.S. 525, 537 (1865) (quoted in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 605 n.28). Indeed, the arbitrators who established the boundary between Maryland and Virginia stated that "[t]he length of time which creates a right by prescription in a private party raises a presumption in favor of a State, that is to say, twenty years." (App. 28a). Regardless of the period of time required, Maryland's longstanding assertion of authority over the Potomac in all respects, coupled with Virginia's acquiescence in and recognition of that authority, demonstrate Maryland's right to regulate the activity at issue in this case.

For these reasons, judgment should be entered in favor of Maryland and against Virginia because Maryland has acted properly in regulating the Potomac as it has for the past two centuries.

CONCLUSION

For the reasons stated, Maryland's motion for summary judgment should be granted.

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IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,	*	No. 129, Original
Plaintiff,	*	Before Special Master
v.	*	Ralph I. Lancaster, Jr.
STATE OF MARYLAND,	*	
Defendant.	*	

* * * * * * * * * * *

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In claiming that it has unrestricted access to the Potomac River, Virginia has failed to dispute any of the evidence that Maryland has produced demonstrating Maryland's entitlement to the entry of summary judgment in its favor. While Virginia argues that the Compact gives it the unrestricted right to build wharves and other improvements in the Potomac, nowhere in its 170-page brief does the Commonwealth make any reference to the undisputed fact that, at the time it entered into the Compact with Maryland, Virginia had already explicitly and unambiguously relinquished in its original Constitution any and all rights of "property, jurisdiction, and government" in or over the Potomac, save for a very limited claim to the shores or strands bordering the river. Such a sweeping surrender of sovereignty necessarily informs and defines the "plain language" that Virginia contends gives it an absolute right of access to the Potomac, and yet the Commonwealth does not even mention it. Virginia's attempt to bury this omission by arguing that the boundary was in dispute is based exclusively on statements that were made in entirely different contexts more than a hundred years after the Compact was written, and is no substitute for the need, in light of both States' undisputed understanding of Maryland's claim to the river at the time the Compact was formed, for clear and unequivocal language that either stripped Maryland of, or vested Virginia with, governmental authority over access to the Potomac. Virginia's claim fails because that language simply does not exist in the Compact.

Like its failure to even so much as acknowledge its own Constitution's recognition of Maryland's authority over the Potomac, Virginia also offers no evidence that refutes the undisputed understanding of both States, as consistently demonstrated since the time of the Black-Jenkins Award and manifested by the hundreds of exhibits that Maryland has produced, that the boundary line described there was and continues to be an absolute line of

sovereignty for all purposes. It is undisputed that, since the beginning of the 1900s, Virginia's Attorneys General, Governors, and other government officials have expressed unequivocally that Virginia has no jurisdiction of any kind beyond low-water mark, either on a wharf or other improvement built from the Virginia side, or otherwise. It is also undisputed, indeed, Virginia has stipulated, that it does not exercise its authority beyond that point *and* that it has not objected to Maryland's multiple exercises of its authority over any and all property and activity beyond low-water mark, whether that authority is in the form of taxes, criminal jurisdiction, occupational safety and health laws, liquor regulations, gambling statutes, or any of the other laws and ordinances that Maryland has enforced on the Potomac.

Virginia's actions speak louder than its words, and even its words, as set forth in its brief, neither question nor dispute three unshakable truths: Maryland has had title to the Potomac River since 1632 and has been its undisputed owner since 1877; Maryland has proven its ownership by exercising every possible police power with respect to any and all property and activities in the river on the Maryland side of the boundary line; and Virginia has never taken a single action that has in any way interfered with Maryland's exercise of sovereignty over the Potomac. These truths are borne out by a highly developed and uncontroverted factual record and point overwhelmingly to the conclusion that the river belongs to Maryland and is subject to Maryland's regulatory authority.

As the Special Master noted previously, "[s]ummary judgment is appropriate when the pleadings and other materials show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Mem. of Dec. No. 4 at 5. The exhibits that Maryland has filed in support of its summary judgment motion "demonstrate

the absence of a genuine issue of material fact," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and Virginia has neither disputed the authenticity of that evidence nor offered "any significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (quotations and citation omitted). Judgment should accordingly be entered in favor of Maryland and against Virginia because Maryland's proof shows that Maryland's ownership of the Potomac includes the sovereign right to regulate any activity, including waterway construction and water withdrawals, occurring in the river beyond the low-water mark.

REPLY ARGUMENT

I. MARYLAND HAS THE RIGHT TO REGULATE ACCESS TO THE POTOMAC.

A. Maryland's Ownership Of The Potomac Includes The Right To Regulate Access.

In arguing that the Compact of 1785 and the Black-Jenkins Award of 1877 "do not give Maryland the authority to regulate Virginia's Potomac River access rights," VA Br. at 75, Virginia fundamentally misdirects the pertinent inquiry to be made at this juncture in this case. The Commonwealth does not dispute that Maryland is the owner of the Potomac to the low-water mark on the Virginia side of the river, nor does it disagree with the well-settled rule that such ownership includes the right to regulate activity that takes place in the river. Virginia thus misstates the question in terms of whether the Compact or the Black-Jenkins Award gives Maryland the authority to regulate, as that authority is a basic aspect of any State's ownership and sovereign control of a river within its borders. *See, e.g., Utah Division of State Lands v. United States*, 482 U.S. 193, 195 (1987); *Illinois Central Railroad Co. v.*

Illinois, 146 U.S. 387, 452 (1894); *Atlee v. Packet Co.*, 88 U.S. 389, 393 (1874).[1] In light of the Special Master's prior determination that "[t]he Compact neither addressed ownership of the bed of the River nor altered ownership of the shores of the River," Mem. of Dec. No. 4 at 20-21, the issue is not whether the Compact or the Award gives Maryland any right to regulate, but rather whether either confers a right to build wharves and other improvements in the Potomac that Maryland cannot regulate. Virginia points to no language in the Compact, the Black-Jenkins Award, or any other source of authority that supports its argument that such a right exists.

As Virginia made clear during the same time frame in which the Compact was drafted, the Commonwealth was well aware of the "rights of property, jurisdiction, and government" when it included this language in its 1776 Constitution and relinquished those rights "and all other rights whatsoever" in the territory described in the Maryland charter, subject only to limited navigation, access, and property claims that it reserved with respect to the Potomac and Pocomoke rivers. *See Maryland v. West Virginia*, 217 U.S. 1, 23 (1910) (quoting Virginia Constitution). Virginia reiterated its understanding of these rights when it enacted legislation three years after the Compact was formed that "for ever ceded and relinquished to the Congress and government of the United States, in full and absolute right, and exclusive jurisdiction as well of soil," property for the formation of "the permanent seat of the general government." MD Ex. CC-7. *See also Handly's Lessee v. Anthony*, 18 U.S. 374, 377 (1820) ("And in January, 1781, the Commonwealth of Virginia yielded to the

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[1] Contrary to Virginia's contention, Maryland does not rely on "Maryland state law" (VA Br. at 100) for this proposition but rather on settled federal common law principles that the Court has recognized time and again in the cases cited above and other decisions cited in Maryland's principal brief at 25-37.

United States 'all right, title, and claim, which the said Commonwealth had to the territory northwest of the river Ohio'").[2]

No comparable language is found anywhere in Article VII of the Compact, which provides only that the "citizens" of each State shall have "full property in the shores of Patowmack river adjoining their lands" and the "privilege of making and carrying out wharfs and other improvements." (App. 3a.) While Virginia argues that "[t]hese provisions say nothing about giving Maryland the right to regulate," VA Br. at 75, no need existed to do so. Maryland had that right because it owned the Potomac and Virginia had already recognized this in its Constitution when it stated that the Commonwealth had no rights of "jurisdiction, and government" with respect to the Potomac. Article VII contains no language that seeks to reverse this posture, either by giving any authority to Virginia or by taking any away from Maryland. Just as Massachusetts's "right of preemption of the soil" and "the estate, right, title and property" in the Treaty of Hartford did not strip New York of its "Government Sovereignty and Jurisdiction" over such interests in the bed of Lake Ontario, *see Massachusetts v. New York*, 271 U.S. 65, 85 (1926), the mere statement in the Compact that the citizens of each State shall have "full property" does not vest Virginia with authority over the exercise of their "privilege" of building wharfs and other improvements in the Potomac, particularly in light of Virginia's broad relinquishment of "all the rights" of "jurisdiction, and

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[2] Virginia's concession of sovereignty over the Potomac fits with the common understanding of sovereignty in the late Eighteenth Century. As demonstrated by historian Jack Rakove, Americans at that time had a "pragmatic understanding" of sovereignty under which "a state could freely yield or modify its authority to exercise certain powers without committing itself to a wholesale renunciation of others," and "States, and especially state legislatures, were jealous of these powers, and did not abandon their authority freely or glibly." MD Ex. A at 21.

government, and all other rights" with respect to that territory that "may at any time heretofore have been claimed by Virginia." *Maryland v. West Virginia*, 217 U.S. at 23 (quoting Virginia Constitution).[3]

Virginia disputes neither the express renunciation of jurisdiction and government over the Potomac that it made in its Constitution, nor Maryland's response to even the limited claim that Virginia asserted with respect to the use and navigation of the river. *See* Lucas & Deaver, eds., *Proceedings of the Province of Maryland* 292-93 (Baltimore, 1836) (Oct. 30, 1776) (Tidewater Ex. 20) (declaring "that the state of Virginia hath not any right or title to any of the territory, bays, rivers, or waters, included in the charter granted by his majesty Charles the first to Caecilius Calvert" and that "the sole and exclusive jurisdiction over the said river Potowmack . . . belongs to this state"). Virginia's failure to produce any evidence to the contrary is significant in light of the Special Master's previous observation that "[n]othing in the Compact does anything other than *confirm* existing rights in or on the River," Mem. of Dec. No. 4 at 20 (emphasis in original), because it proves it is uncontroverted that both States shared the clear understanding at the time the Compact was formed that Virginia's existing "rights" in or on the Potomac were quite limited. *Accord* Robert A. Rutland, *The Papers of James Madison*, Vol. 8, at 10 (Tidewater Ex. 34) (letter from Madison to Jefferson recognizing that the Virginia Constitution effectuated "an entire relinquishment of jurisdiction" over the Potomac). Maryland's recognition of those rights

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[3] *See also* Rakove Declaration, MD Ex. A at 20-21 (stating that the Mount Vernon Compact is "consistent with both the state's conception of its sovereignty and the idea, fundamental to the Founding era, that such diminutions of a state's sovereignty as it chose to make had to be phrased in precise terms, with the residual authority not surrendered remaining among the larger body of police powers that the state retained").

in the Compact, like Delaware's "approval" of the exercise of an identical privilege from the New Jersey side of the Delaware River, did not constitute "an abandonment by the Sovereign of title to the soil." *New Jersey v. Delaware*, 291 U.S. 361, 375 (1934). On the contrary, as the Court observed with respect to the effect that the very same Compact provision at issue in this case had on the "shores" of the Potomac, it "imports nothing as to the sovereignty over them." *Smoot Sand & Gravel Corp. v. Washington Airport*, 283 U.S. 348, 351 (1931).

Virginia proves both States' ability to address the exercise of such sovereignty over the Potomac by pointing out that "[w]hen the State of Maryland and the Commonwealth of Virginia intended to create a permitting system governing their respective uses of the Potomac River, they did so expressly." VA Br. at 76. While Article VII, as the Special Master has stated, "protects for all citizens of *both* States property rights in their lands adjoining the River," Mem. of Dec. No. 4 at 14 (emphasis in original), it does not expressly or implicitly establish a permitting system or any other kind of construct that in any way strips Maryland of – or vests Virginia with – any right of jurisdiction or government over the exercise of those rights. Rather, as the Court has observed, by recognizing that Virginia citizens had full property in the shores of the Potomac, the Compact "carried the jurisdiction and title to the water's edge." *Oklahoma v. Texas*, 260 U.S. 606, 633 (1923). The Compact does not give Virginia any authority beyond that point.

Arguing otherwise, the Commonwealth asserts that "[w]hen Virginia's Potomac River access rights were first codified in Article VII of the Compact of 1785, the boundary line was hotly contested." VA Br. at 91. Virginia produces no evidence to supports its argument that the boundary line was in dispute and instead relies entirely upon passages from decisions rendered long after the Compact was written in which the status of the boundary as of 1785

was not even at issue.[4] Virginia's Constitution, the response of the Maryland delegation, and other contemporaneous sources make clear that there was, in fact, very little dispute about Virginia's claims to the Potomac.[5] The first evidence of Virginia even having *investigated*

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[4] For example, in *Marine Ry. & Coal Co. v. United States*, the issue before the Court was the boundary line as of 1921, not 1785. *See* 257 U.S. 47, 63-64 (1921). While the Court noted that the boundary line was not settled until 1877, the extent of any dispute was narrow: "[t]hat the original title of Maryland extended at least to low water mark on the Virginia side it now is too late to deny . . . ." *Id.* at 63. Similarly, *Morris v. United States* involved title to lands on the *Maryland* side of the river and the boundary on the Virginia shoreline was not at issue. With respect to that boundary, the Court stated that "[t]he record discloses no evidence that at any time any substantial claim was ever made by Lord Fairfax . . . to property rights in the Potomac river, or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands or soil under the river private persons." 174 U.S. 196, 224-25 (1899). Finally, while the Maryland Court of Appeals in *Barnes v. State*, 186 Md. 287, 47 A.2d 50 (1946), discussed the history of the Compact, the issue before it involved criminal jurisdiction over the river as of 1945, not 1785. None of these cases supports Virginia's contention that the boundary line was "hotly contested" when the Compact was written.

[5] For example:

- In 1787, Edmund Randolph, one of the Virginia commissioners appointed to negotiate the Compact, stated that one of the reasons for joining the Federal union was that, if Virginia did not, it would lose its Compact navigation rights on the Potomac because, "[i]f ever it should be decided on grounds of prior right, their [Maryland's] charter will inevitably determine it in their favor;" *see* 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Vol. 1 at 75 (2nd Ed. 1836) (MD Ex. DD-1);

- In 1791, Maryland ceded for the formation of the District of Columbia territory which has repeatedly been held to have encompassed the Potomac. *See, e.g., United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 353-54 (1933); *Marine Ry. & Coal Co., Inc. v. United States*, 257 U.S. 47, 33-34 (1921); *Morris v. United States*, 174 U.S.at 230, 246-47; *United States v. Herbert Bryant, Inc.*, 740 F. Supp. 863, 864 (D.D.C. 1990).

- In 1804, Rep. John Randolph of Virginia stated that, as of the 1789 cession to the District, Virginia's "limits did not extend beyond high water mark on the western bank of the Potomac" and that whatever jurisdiction Virginia had over the Potomac was "entirely derived" from the Compact with Maryland and "was a jurisdiction not

(continued...)

the possibility of a claim to the Potomac beyond the shores and strands comes in 1860, when the Virginia General Assembly dispatched Col. Angus McDonald to England to locate documents that might support a claim to the Maryland shore – a fact that Virginia does not dispute. *See* Reply Brief in support of Virginia's Motion for Partial Summary Judgment at 13 n.22.[6]

Virginia's argument fails even if the Court were to proceed on the assumption that the boundary line was in dispute when the Compact was written. Indeed, while the Compact specifically identified which State had criminal jurisdiction over "piracies, crimes or offences" that occurred "on that part" of the Chesapeake Bay and the Pocomoke River "where the line of division between the two states . . . is doubtful" (App. 4a), and also

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[5] (...continued)
within her limits." *Annals of Cong.*, 8th Cong., 2nd Sess., November 28, 1804, at 715 (Tidewater Exhibit 84);

- In 1804, Rep. Christopher Clark of Virginia stated that "[i]t had been stated, and generally agreed to, and he supposed was correct, that the State of Maryland, previous to her compact with Virginia, rightfully claimed the whole river Potomac to the high-water mark on the western bank." *Id.* at 719;

- In 1804, Rep. Joseph H. Nicholson of Virginia stated that "[p]revious to the compact between Virginia and Maryland, the latter claimed the river Potomac as its exclusive property" and that "Virginia had no power to make the cession of the Potomac [to the District], because she had not the jurisdiction over it, and could not grant more than she possessed." *Id.* at 721.

[6] In 1872, when the Maryland commissioners arrived at the negotiations that would eventually lead to the Black-Jenkins Award, they were genuinely surprised to learn that Virginia was asserting, for the first time, a claim to the entire width of the Potomac as her own. Tidewater Ex. 89 at 5. That claim was short-lived. When Virginia raised the claim in the Black-Jenkins Arbitration, Virginia's counsel immediately retreated, noting that "a true interpretation" would put the boundary at the middle of the river. (App. 17a.) Although the Arbitrators acknowledged that Virginia had certain rights in the river beyond low water mark, they rejected Virginia's attempt to show ownership of any part of the Potomac riverbed beyond that point. (App. 30a-31a.)

identified the circumstances in which each State could exercise criminal jurisdiction over crimes committed on the Potomac (App. 5a), Article VII says nothing about jurisdiction over the construction of wharves and other improvements in the Potomac. Although Virginia claims that "the only reasonable inference" from this silence "is that each state intended in Article VII to regulate the exercise of its *own* citizens' construction activities only," VA Br. at 96 (emphasis in original), that silence meant no such thing. It truly "would have astounded the drafters of the Compact of 1785," VA Br. at 92, to learn that, by recognizing that Virginia citizens had the same privilege as Maryland citizens to build wharves and other improvements in a river with respect to which Maryland asserted it had "the sole and exclusive jurisdiction" and "the State of Virginia hath not any right or title," Lucas & Deaver, eds., *Proceedings of the Province of Maryland* 292-93 (Baltimore, 1836) (Oct. 30, 1776) (Tidewater Ex. 20), Maryland's silence meant that it was relinquishing a fundamental aspect of its "ownership of the land underlying such waters." *Idaho v. United States*, 121 S.Ct. 2135, 2142 (2001). "[T]he silence of the Compact was on the subject of settled law . . . , which the parties' silence showed no intent to modify." *New Jersey v. New York*, 523 U.S. 767, 783 n.6 (1998).

There is also more than a little irony in Virginia's hyperbole that the Compact drafters would have been astounded by "the idea that Virginia's Potomac River access rights under Article VII could be regulated by Maryland." VA Br. at 92. The idea was not astounding to the Virginia Marine Resources Commission (VMRC), which has for decades referred Virginia shoreline projects to Maryland, not out of administrative comity, but out of the recognition and understanding that, as the VMRC informed one Virginia citizen in one of the hundreds of referral letters it has issued, "the Maryland Department of Natural Resources has

jurisdiction over waters of the Potomac River below mean low water and you may need a permit from them before you begin construction." MD Ex. BB-80. Nor was the idea astounding to the Virginia State Water Control Board (SWCB), which is charged by the Virginia Legislature to speak for the Commonwealth on matters involving water resources and Virginia's riparian rights,[7] and which has repeatedly counseled Virginians that it is Maryland that has the authority to regulate the construction of improvements such as boat ramps and dredging projects in the Potomac, not Virginia.[8] Nor was it astounding to Virginia's Counsel of Record in this case, who reviewed Maryland's unequivocal assertion of jurisdiction in its 1987 "Policy Clarifying Wetlands License Requirements for Projects in Maryland Waters Along the Virginia Shore of the Tidal Portion of the Potomac River," MD Ex. AA-11, and did not remark on, much less express astonishment at, the idea, MD Ex. AA-7, despite the fact that he was well aware of the Compact of 1785 and Virginia's assertion of its riparian rights under the Compact during the negotiations surrounding the Low Flow

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[7] *See* Va. Code Ann. § 62.1-44.41; Letter from Virginia Attorney General to the SWCB's Executive Secretary (Jan. 11, 1978), MD Ex. DD-9, VA-SRC-002135 (stating that the riparian right to use the Potomac River is a water resource of the State on which the Board can speak).

[8] *See* MD Ex. CC-27 (May 3, 1979 letter from the SWCB referring the Northern Virginia Regional Park Authority to Maryland for review of the Park Authority's proposed boat ramp and stating that "[w]hile the work you have described will take place on the Virginia shoreline, any work done in the waterway will take place in the Potomac River and will be under the jurisdiction of the State of Maryland."); MD Ex. BB-348, MD-MDE-13180-01 (SWCB letter dated January 25, 1979, stating that the effect on seafood of dredging of Potomac in connection with proposal to build docking facility on Virginia shoreline "is out of our jurisdiction" because the "channelward of mean low water . . . comes under the jurisdiction of the State of Maryland").

Allocation Agreement of 1978. *See* VA Ex. 182.[9]

There simply was and still is nothing remarkable about Maryland's regulation of Virginians' access rights, thus proving that much more than silence is needed before the conclusion can be reached that "the compact limits or restricts one state's sovereignty vis-à-vis the other state." VA Br. at 99. Contrary to Virginia's contention that the rule of construction is different when an interstate compact is involved, VA Br. at 97-99, the same rule applies whether interpreting a compact, *Central Railroad Co. of New Jersey v. Mayor and Aldermen of Jersey City*, 209 U.S. 473, 479 (1908), a treaty, *Massachusetts v. New York*, 271 U.S. at 89, or a royal charter, *Martin v. Waddell*, 41 U.S. 367, 414 (1842): "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself." *United States v. Oregon*, 295 U.S. 1, 14 (1935) (citing *Massachusetts v. New York*, 271 U.S. at 89). Mere silence is not enough to overcome the presumption that the owner of the lands underlying the Potomac – which was never in serious question and, as subsequent events conclusively proved, is Maryland – retained its sovereign "control over the waters above them," *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 452, including "control over the location, erection, and use of such wharves and landings," *Atlee v. Packet Co.*, 88 U.S. at 393, that the Compact recognized citizens on both

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[9] The list goes on: Virginia agencies and political subdivisions such as the Virginia Department of Health (MD Ex. CC-32), Fairfax County (MD Ex. CC-37), King George County (MD Ex. CC-30), and the Town of Colonial Beach (MD Ex. CC-35) have all stated unequivocally that Maryland has the authority to regulate the exercise of riparian rights in its territory.

sides of the river had the privilege "of making and carrying out."[10]

Maryland confirmed its understanding that the Compact did nothing to divest it of such control over wharves and other improvements when it enacted legislation shortly after ratifying the Compact that ceded territory for the formation of the District of Columbia and vested the commissioners appointed by the President with licensing authority over the building of wharfs in the Potomac in that territory. MD Ex. CC-1. While Virginia argues that this licensing authority pertained to construction occurring only on Maryland's side of the Potomac, VA Br. at 80-85, this argument proves Maryland's point: the Compact is utterly silent on a key aspect of sovereignty that Maryland, when it intended to, relinquished in explicit terms in its cession of property to the federal government. Had Maryland's cession of this land automatically carried with it Maryland's sovereign authority over it, there would have been no need for Maryland to expressly provide the commissioners with such authority. That it did so manifests Maryland's plain understanding that the sovereign right to regulate the construction of wharves is a fundamental component of its ownership of the Potomac. The Compact simply did not address this authority, much less give it to Virginia.

Virginia's evidence also reaffirms the understanding of Maryland and others that Maryland's ownership of the Potomac included the entire river. Indeed, the description of the property to be ceded included a specific reference to Jones Point, Virginia and was first set forth in a Presidential Proclamation dated March 30, 1791. *See* Dorothy Twohig, *The*

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[10] Rather than address this point, Virginia addresses at length an argument Maryland has never made, namely, that Maryland "has the right to cut off Virginia's water supply." VA Br. at 116. While the Compact does not contain any language that gives Virginia citizens an unrestricted right of access to the Potomac, Maryland has never disputed, as Virginia suggests that it has, that they have a right to withdraw water. Maryland argues only that it has the authority to regulate that right if it is exercised within Maryland territory.

Papers of George Washington, Vol. 8, at 27 (1999) (VA Ex. 279B). That description is identical to the property description in the law that Maryland enacted several months later. Citing that law, the Court observed 140 years later that Maryland, not Virginia, was the source of the United States' authority to regulate construction on the Virginia side of the river lying within the District of Columbia. Addressing the request for "a writ of mandamus to compel the Secretary of War and the Chief of Engineers to authorize the construction of a wharf in the Potomac river within the District of Columbia adjacent to their land on the Virginia shore," *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 353 (1933), the Court stated that "title" to and "sovereignty over" that portion of the river "were vested in the United States by cession from the state of Maryland of the area constituting the present District of Columbia." *Id.* at 354. *See also Marine Ry. & Coal Co., Inc. v. United States*, 257 U.S. 47, 33-34 (1921); *Morris v. United States*, 174 U.S. 196, 230, 246-47 (1899). This statement refutes Virginia's contention that the Compact gives that sovereignty to the Commonwealth.

B. The Black-Jenkins Award And The Two States' Treatment Of The Boundary Line Set Forth In The Award Reinforce Maryland's Right To Regulate Access To The Potomac.

In conclusively establishing Maryland's ownership of the lands beneath the Potomac up to the low-water mark on the Virginia side of the river, the Black-Jenkins Award confirmed Maryland's authority over the Potomac to that point. The Arbitrators relied upon the settled rule that was "well illustrated" in *Ingersoll v. Howard*, 54 U.S 381 (1851), namely, that a boundary that runs "along" the far bank of a river includes the entire river, and concluded, based on language in the 1632 Charter giving to Lord Baltimore land "to the further bank" of the Potomac, that "[t]he intent of the charter is manifest all through to

include the whole river within Lord Baltimore's grant. It seems to us a clearer case than that decided in *Ingersoll v. Howard*." (App. 19a.) *See also Handly's Lessee v. Anthony*, 18 U.S. at 379 ("[W]hen, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only."). Virginia ignores this language and the Commonwealth's disclaimer that "[t]his case is not about changing the boundary line that was set up by the Black-Jenkins Award," VA Br. at 1, and states – incorrectly – that "[i]n the arbitrators' view, Virginia's rights in the River were equivalent to ownership by express grant, entitling Virginia to use of the Potomac River 'to the middle of the channel.'" *Id.* at 78 (quoting App. 41a). As demonstrated by the portions of the Arbitrators' Opinion that immediately precede and follow the passage containing this quote, the Arbitrators were not discussing the Potomac but rather Smith's Island. *See, e..g.*, App. 38a ("We must now go back to Smith's Island."); App. 42a ("We run to Sassafras Hammock and from that to Horse Hammock, because we cannot in any other possible way give Virginia the part of Smith's Island to which she shows her right by long possession.").

Rather than place the boundary at the usual high-water mark that accompanies such a grant, the Arbitrators placed it at the low-water mark based on the doctrine of prescription and acquiescence. (App. 29a.) The Arbitrators squarely rejected, however, the Commonwealth's contention – which is the same contention that it makes in this case – that her ownership extended beyond the low-water mark. Stating that Virginia's "efforts to show that she acquired, or that Maryland lost, the islands or the bed of the river, in whole or in part, have been less successful" (App. 30a), the Arbitrators determined that the evidence before them demonstrated "satisfactorily that Maryland had granted all the islands, taxed the

owners, and otherwise exercised proprietary and political dominion over them." (App. 31a.) Declaring that "[t]hree Virginia grants were produced which purported to be for islands in the Potomac, but on examination of the surveys it appeared that they were not *in*, but *upon*, the river" (*id.*) (emphasis in original), the Arbitrators concluded that "[a]ll are on the Virginia side of the low-water mark, which we have said was the boundary between the States." (*Id.*)[11] It is extremely doubtful that the Arbitrators would have concluded that the Commonwealth's ownership to the low-water mark did not extend beyond that point if they

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[11] In light of the Arbitrators' rejection of Virginia's contention that the Commonwealth had any ownership rights in the bed of the river beyond low-water mark, Virginia misplaces its reliance on cases involving "questions of equitable apportionment of an interstate stream." VA Br. at 101. Not one of these cases involved one State's efforts to withdraw water from the territory of another State, thereby implicating the sovereign rights of the State within which the river flows – both in the waters themselves and the submerged lands that are particularly bound up with sovereignty. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (emphasizing the State's "sovereign control" over submerged lands which have "a unique status in the law" and are "infused with a public trust the State itself is bound to respect"); *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment) ("We have repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State's ability to regulate use of its navigable waters."). Virginia cites no case that questions a State's authority to regulate water withdrawals from its own territory, much less the placement of structures on State-owned submerged lands, because the established law is to the contrary. *See, e.g., Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956-57 (1982) (giving at least four reasons why the Court "is reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage"). While Virginia finds significance in the Court's observation in *Sporhase* that "[o]bviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State," 458 U.S. at 957, this does not mean, as Virginia implies, that imposing the same restrictions on the citizens of other States constitutes such discrimination. Rather, the Court simply made the point that Nebraska could not be said to be discriminating against other States when it imposed the same restrictions on its own citizens. Indeed, in the very next sentence that Virginia does not quote, the Court noted that "[a]n exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation." *Id.* So it is in this case, where Marylanders and Virginians alike must obtain the same Maryland permits to withdraw water from, or place structures in, the Potomac.

shared Virginia's view that "Maryland fully conceded during the arbitration that Virginia had the right to construct improvements from the shoreline in her own discretion." VA Br. at 78.[12]

The subsequent conduct of both States and their citizens conclusively proves that they construed the boundary line set forth in the Award as the absolute line of sovereignty in all respects.[13] That conduct is not only relevant "to a *defense* that rights protected by the

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[12] Rather than make such a concession, Maryland unequivocally opposed before the Arbitrators Virginia's attempt to assert any authority over the Potomac. In summarizing Maryland's position for the Arbitrators, Maryland's counsel explicitly stated not only that Maryland was the owner of the Potomac to the bank on the Virginia side of the river, but also that, in direct response to the Virginia Constitution's recognition in 1776 of Maryland's authority over the river, the people of Maryland "did not hesitate, formally by resolutions in their Convention, on the 30th day of October, 1776, to protest against Virginia's pretensions to jurisdiction even over the 'shores and strands' on the southern side of the Potomac." Synopsis of Argument made by Pinkney White at 19, VA Ex. 123. That limited claim was not the focus of the arbitration proceedings, however, but rather Virginia's new assertion that it was the owner of the Potomac "either to the north bank of that river, or to the middle of the stream[.]" *Id.* at 22. In response to that assertion, Maryland concluded its argument by stating that the boundary line "at the very least" was at the low-water mark on the Virginia side and followed the river around wharves and improvements built there (*id.* at 36), but this hardly constitutes a relinquishment of Maryland's rights in the river and sovereign authority that accompanies such rights. Instead of viewing Maryland's statements that way, the Arbitrators drew the boundary line at low-water mark and respected Maryland's sovereignty by providing that Virginia's exercise of the right to use the Potomac beyond that line could be made only without impeding navigation "or otherwise interfering with the proper use of it by Maryland." (App. 49a.) Maryland's regulation of the Potomac is one such use.

[13] Even before the Award was made, the understanding existed that Maryland permission was needed to withdraw water from the Potomac. Virginia does not dispute that Congress came to Maryland, and not Virginia, when it sought to procure water from the Potomac River for the District of Columbia. While Virginia argues that this was because "the Army Corps of Engineers had already recommended that the intake for the water supply be on the *Maryland shore* of the River at Great Falls," VA Br. 85 (emphasis in original), it ignores the fact that the intake was being supplied through the construction of a dam that extended "all the way across the River to the Virginia shore" (*id.* at 86) and, therefore, would be withdrawing water from the entire Potomac, not just the Maryland shore. That Congress came to Maryland for its approval for the project shows that Congress understood Maryland

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compact were subsequently lost," VA Br. at 90 (emphasis in original), but also informs the meaning of the Award itself and the "practical construction" that both States and their citizens have subsequently given it. *Vermont v. New Hampshire*, 289 U.S. 593, 619 (1933). *See also Air France v. Saks*, 470 U.S. 392, 396 (1985); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *Massachusetts v. New York*, 271 U.S. at 94. That conduct has consisted of a broad range of activities that, since the time the boundary line was conclusively settled, has evidenced the understanding both States have consistently shown, through the actions and words of their officials and citizens, that Maryland's sovereignty over the Potomac begins, and Virginia's ends, at the low-water mark on the Virginia side of the river.

Virginia is thus wrong in asserting that none of these many other "activities has anything whatsoever to do with Virginia's right to withdraw water from the Potomac River or to build improvements from the shore." VA Br. at 89. Just as it is "appropriate," as the Commonwealth concedes, "to consider whether the two states have imposed real property taxes on improvements extending from the Virginia shore," (*id.*), it is also proper to examine

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[13] (...continued)
to have jurisdiction over construction in, and the withdrawal of water from, the Potomac and that Virginia had jurisdiction only over the abutments on the Virginia shore.

The history surrounding the passage of the legislation authorizing this project underscores this understanding. The proviso requiring that the President obtain the assent of Maryland was initially included in an amendment offered by Sen. Pratt of Maryland, who stated in the ensuing debate that Maryland's assent was necessary because "the whole Potomac river belongs to the State of Maryland up to the low-water mark on the Virginia shore." *Congressional Globe* (Feb. 28, 1853), MD Ex. DD-2, at 901. At no point in the debate did any member of the Virginia congressional delegation claim that Virginia owned any portion of the Potomac or otherwise object to Maryland's pointed assertion of its sovereignty over the river. To the contrary, when the Virginia legislature acted to give its assent to the project, it reached only the abutments and quarries on the Virginia shore. *See* VA Ex. 294.

other regulatory actions taken with respect to such improvements that reflect the two States' understanding that the boundary line set forth in the Black-Jenkins Award defines the line of sovereignty for all purposes. Indeed, while the Attorney General of Virginia had at one time expressed the view that the Compact made "exempt" from the "power of Maryland" property attached to the Virginia side of the Potomac, *O'Neal v. Virginia and Maryland Bridge Co. at Shepherdstown*, 18 Md. 1, 9 (1861), after the Black-Jenkins Award was rendered in 1877, his successors consistently recognized, as did agencies and citizens on both sides of the Potomac in a variety of contexts, that the "power of Maryland" began on the Maryland side of the boundary line described in the Award, without regard to the nature of the activity involved. Those recognitions bear directly on the construction to be given to the boundary line established by the Award.

In arguing that "virtually all of Maryland's evidence on these subjects arose *after* 1950," VA Br. at 89 (emphasis in original), Virginia fails to refute any of the evidence produced by Maryland to show that both States have treated the boundary line as an absolute line of sovereignty since the time the Black-Jenkins Award was made. Virginia does not dispute that Maryland has regulated dredging, mining, and extraction activities in the Potomac since 1888, nor does Virginia dispute – on the contrary, it has conceded – that it has not regulated those activities since at least that time. MD Ex. CC-16, ¶ 162. Virginia also does not dispute that, since at least 1900, it not only has not enforced any gambling, gaming, health, or occupational safety laws beyond the low-water mark, but also that it does not even have any laws providing for general criminal jurisdiction with respect to activities occurring either in the Potomac "or on a structure in the Potomac River, on the Maryland side of the Maryland-Virginia line." MD Ex. CC-14, ¶¶ 7, 10. The Commonwealth also does not refute

that it recognized almost a century ago that Maryland does have jurisdiction in those circumstances, *see* July 2, 1906 Va. Att'y Gen. Op. 87 (MD Ex. CC-8), and similarly produces nothing to contest the evidence set forth in Maryland's principal brief (at 51-56; 60-61; 63-75) demonstrating that the Commonwealth has benefitted from Maryland's exercise of authority to achieve what Virginia could not, due to its uncontroverted lack of power.[14]

Virginia also does not dispute the many express and unqualified opinions its Attorneys General have made over the course of the century following the Black-Jenkins Award in which the highest law enforcement office of the Commonwealth acknowledged, starting in 1906, Virginia's utter lack of any "legal right," July 2, 1906 Va. Att'y Gen. Op. 87 (MD Ex. CC-8); "authority," June 21, 1935 Va. Att'y Gen. 147 (MD Ex. CC-9); *accord* July 30, 1952 Va. Att'y Gen. Op. 116 (MD Ex. CC-12); "jurisdiction," September 1, 1944 Va. Att'y Gen. Op. 91 (MD Ex. CC-10); or "territorial jurisdiction," July 13, 1948 Va. Att'y Gen. Op. 118 (MD Ex. 11), over a broad range of activities occurring beyond the low-water mark on Virginia's side of the Potomac. Virginia cannot, of course, retract these unambiguous

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[14] This evidence also belies Virginia's claim that one State is "systematically incapable of adequately protecting the interests of a sister state." VA Br. at 103. Rather than produce evidence that might create a genuine issue of material fact, Virginia instead devotes a number of pages decrying "Maryland's recent treatment of the FCWA." VA Br. at 106. In doing so, Virginia also ignores the undisputed evidence that, notwithstanding the Commonwealth's apparent distrust of the Maryland administrative and judicial process, it was through that very process that the Fairfax County Water Authority received a permit allowing it to construct the waterway intake pipe that lies at the heart of the present controversy between the two States. That evidence refutes Virginia's irrelevant and one-sided version of purported facts that it claims show an "overwhelming" appearance of "political manipulation to block the FWCA's project." VA Br. at 110. While Maryland will not engage in a point-by-point refutation, Virginia's accusations of anti-Virginia political influence are also rebutted by the Declaration of the Secretary of the Department of the Environment, Jane T. Nishida, who states unequivocally that the decision to deny the permit was neither politically influenced nor based on comments concerning economic competition between the two States. *See* MD Ex. EE.

acknowledgments of Virginia's lack of jurisdiction and authority, nor can it produce any evidence to contradict them, and so instead Virginia attempts to sidestep these opinions on the ground that none "held that Virginia was subject to Maryland's authority with respect to the withdrawal of water or the construction of improvements from the Virginia shore." VA Br. at 163. This does not change the undisputed fact that all of the opinions recognized that Virginia had no authority at all beyond the low-water mark. Indeed, the only time that even Virginia claims its Attorneys General have ever "reaffirmed Virginia's compact rights" (VA Br. at 163) beyond low-water mark has been in connection with "the right to fish." March 9, 1955 Va. Att'y Gen. Op. 117, 118 (VA Ex. 311). *Accord* June 23, 1927 Va. Att'y Gen. Op. 182 (VA Ex. 310). In all other matters, including those involving the right to build piers and wharves, it is undisputed that the Virginia Attorney General has treated the boundary as an absolute line of sovereignty.

In fact, two of the opinions cited above specifically acknowledge that the exercise of the right to build a pier from the Virginia side of the Potomac does not vest Virginia with, or strip Maryland of, any authority over that portion of the pier that extends beyond the low-water mark. In response to a question concerning Virginia's jurisdiction over a pier affixed to the Virginia side of the Potomac, the Commonwealth's Attorney General stated expressly that the "territorial jurisdiction of the Commonwealth ends at the low-water mark," notwithstanding any exercise of the "privilege of building piers" set forth in the Compact, with the result that any "portion of a pier which is beyond the low-water mark on the southern shores of the Potomac River is in the State of Maryland and is not subject to the laws of the Commonwealth." July 13, 1948 Va. Att'y Gen. Op. 118 (MD Ex. CC-11). Two decades later, in response to another question concerning Virginia's authority over a pier

built from the Virginia side of the river, the Virginia Attorney General again focused on the "right to build a pier or wharf" and stated that "the lawful exercise" of such a right "would not change the boundary line between Virginia and Maryland." April 25, 1967 Va. Att'y Gen. Op. 48, 49 (MD Ex. CC-13). Each of these opinions recognized and did not question that Maryland exercised authority over that part of the pier lying beyond the low-water mark. Each also makes clear, as do the other Virginia Attorney General opinions dating back to the beginning of the 1900s, that the jurisdiction and boundary of the two States are one and the same under the Black-Jenkins Award without regard to the activity in question, including the exercise of any Compact rights.

Perhaps more importantly, Virginia simply misses the significance of the opinions of its Attorneys General. Those opinions, when considered in conjunction with the hundreds of other exhibits that Maryland has produced, evidence a clear and uniform understanding handed down from generation to generation from the time of the Black-Jenkins Award, through the turn of the next century, and reaffirmed continuously through the present in a multitude of ways that Maryland has identified in those exhibits and that Virginia has not refuted. While much of this evidence consists of conduct that Maryland has been able to document for the last 50 years, the various opinions of the Virginia Attorneys General prove that this conduct did not suddenly materialize out of thin air but, rather, has roots that trace back to long before and is based upon a documented historical chain of custody that links the last half century with the contemporaneous interpretation that both States shared when the boundary between them was conclusively identified in 1877. That shared interpretation – that the Award's boundary line between the States represents an absolute line of sovereignty,

regardless of the activity in question – "is good indication of its meaning." *New Jersey v. New York*, 523 U.S. at 831 (Scalia, J., dissenting).

Virginia offers no evidence that even suggests the two States interpreted the boundary line in any other way. Virginia's response to Maryland's evidence concerning real property taxation activities only confirms that both States have treated the boundary line as the line of sovereignty. Virginia argues that there are more than 300 piers, docks, and boating ramps extending from the Virginia side of the Potomac beyond the low-water mark that its localities tax and Maryland does not, VA Br. at 134, but it omits the reason why this is so. As set forth in the declarations filed in support of Virginia's brief, these structures are taxable by Virginia's localities as part of the value of the real property to which they are attached on Virginia's side of the low-water mark. *See* VA Ex. 127, ¶¶ 3-4; VA Ex. 131, ¶ 3. Maryland's taxation of these structures would not only amount to double taxation, but would also be tantamount to taxing land in Virginia. In cases where that connection is absent, *i.e.*, when the structure on Maryland's side of the low-water mark has value independent of the land in Virginia, Maryland taxes those properties and, as Virginia's declarations confirm, Virginia does not. *See* VA Ex. 127, ¶ 4; VA Ex. 131, ¶ 3. Indeed, Virginia taxes only the pier or deck extending from the Virginia shore to the structure, but not the "offshore property and improvements." VA Ex. 127, ¶ 4. Virginia has also conceded that it has not imposed any sales, use, litter, entertainment, personal property, or income taxes on any activities or structures located beyond the low-water mark of the Potomac. MD Ex. CC, ¶ 13.

While Virginia attempts to minimize the significance of the two States' respective tax treatment of these properties by asserting it involves "a handful of establishments," VA Br. at 132, Virginia does not deny that, in fact, Maryland has identified the entire universe of

establishments that have been built off the Virginia side of the Potomac. As to that universe, the evidence is undisputed that Maryland has imposed real property taxes since at least 1952, MD Exs. F, H, W, that Maryland has for an even longer period imposed a number of other taxes, issued licenses, policed, and taken numerous other regulatory actions with respect to these and many other properties and activities on piers and wharves on the Virginia side of the Potomac, MD Exs. B through BB, and that Virginia, in contrast, has not done so *and* has not objected to Maryland's regulatory activities. MD Ex. CC-14, ¶¶ 11, 12, 13, 14.[15] Just as significantly, Virginia has not identified a single regulatory action that it has ever taken with respect to any activity that takes place on Virginia's side of the Potomac River beyond low-water mark. The only authority, of any kind, that the Commonwealth claims it has exercised beyond the boundary line is in the form of real property taxes, but the justification for this taxation is not that Virginia has authority over improvements built from the Virginia side wherever those improvements may lie. Rather, as Virginia's own declarations state, these piers, wharves, etc. are taxed as part of the value of the land in Virginia to which they are affixed. The exercise of that limited authority, when contrasted with the localities' deliberate decision not to tax improvements that do not have such a connection to the real property, proves yet again the two States' deeply rooted understanding that the boundary line represents an absolute line of sovereignty.

This same understanding, not the Clean Water Act as Virginia claims, VA Br. at 151-54, is also the explanation for Virginia's recognition that Maryland regulates waterway

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[15] In light of the evidentiary showing it has made, Maryland's evidence is hardly comparable to what Kentucky relied upon in claiming sovereignty over the Ohio River, namely, "that Kentucky has imposed a property tax on only 3 of the 15 structures that extend out, into, or over the water from the Illinois shoreline." *Illinois v. Kentucky*, 500 U.S. 380, 385 (1991).

construction activities beyond the low-water mark. Virginia's post hoc attempt to explain away the hundreds of letters the Virginia Marine Resources Commission (VMRC) has written referring applicants to Maryland is belied by the letters themselves, which make no reference of any kind to the Clean Water Act as the Commonwealth's justification for informing its citizens that Virginia does not have jurisdiction over their permit requests but that Maryland does. Indeed, rather than cite the Clean Water Act as the reason why Maryland has jurisdiction, one of those letters explicitly cites the Compact as the basis for Maryland's authority over construction in the Potomac beyond low-water mark. MD Ex. BB-346 at VA-MRC-F-00354. These letters from the Virginia agency charged with managing the Commonwealth's public trust responsibilities over its submerged lands, *see* Va. Code Ann. § 28.2-1205 – acknowledging that it is Maryland, and not Virginia, that has jurisdiction over the placement of structures beyond the boundary line in the Potomac – have not been refuted by any evidence from Virginia and are yet further proof of how both States have recognized that "[t]he boundary line is the line of sovereignty," *Central Railroad Co. of New Jersey v. Mayor and Alderman of New Jersey*, 209 U.S. 473, 593 (1908), by treating the boundary set forth in the Black-Jenkins Award as "the jurisdictional line." *Morris v. United States*, 174 U.S. at 218.[16]

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[16] There is also no merit in any of Virginia's other efforts to reduce the legal significance of these letters. The fact that Maryland processed many Virginia applications through a "letter of no objection" rather than a full wetlands license does not undermine Maryland's authority, particularly when Maryland developed the 1987 Virginia shoreline policy and regulations to accommodate *Virginia's* request. *See* MD Ex. AA-12. The documents surrounding the development of that policy evince not the slightest doubt about Maryland's jurisdiction. *See* MD Exs. AA-1-13. Similarly, while Virginia argues that the fact the VMRC "does not issue any permits for the use of bottom lands beyond the boundary line" does not mean that

(continued...)

While Virginia places heavy reliance on several statements made in connection with the Low Flow Allocation Agreement, none of those statements refutes the two States' interpretation and treatment of the boundary line as a uniform demarcation of sovereignty. First, the statements are limited to the area of water appropriation, were not expressed until the mid-1970s, and are hardly enough to cast doubt upon, much less nullify, a full century of statements, actions, and opinions from each State evidencing their longstanding view and multi-faceted treatment of the boundary line set forth in the Black-Jenkins Award as an absolute line of sovereignty. *Cf. Georgia v. South Carolina*, 497 U.S. 376, 391 (1990) (agreeing that, notwithstanding actions it took since 1955, "Georgia asserted no act of dominion or control over the Barnwell Islands from 1787 until the 1950's, and acquiesced in South Carolina's jurisdiction through long inaction in the face of the latter's continuing and obvious exercise of dominion since 1795").

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[16] (...continued)
"Maryland has the authority to control the rights of Virginia and its citizens," VA Br. at 159, the letters do not simply inform Virginia applicants that no Virginia permit is required but rather contain affirmative admissions, in letter after letter, that Maryland has jurisdiction beyond the low-water mark and that a Maryland permit may be required. Finally, while Virginia attempts to argue that these letters have no legal significance because they are merely statements of its "staff" as opposed to its "policy-making commissioners" (VA Br. at 159), Virginia ignores that it is the staff of the VMRC that actually does the work of the Commission, including routinely making jurisdictional determinations, *see, e.g.*, MD Exs. BB-346 at VA-MRC-F-00354, MD Ex. BB, ¶¶ 39-43, and are the individuals who have first-hand experience concerning how the two States have identified their respective jurisdictions over their aquatic resources. In addition, Norman E. Larsen, a former Assistant Commissioner of the VMRC, presided over the VMRC's successful negotiations to help streamline the Maryland permitting program for Virginia landowners and wrote many of the letters himself. *See, e.g.*, MD Exs. AA-2; BB-21 at VA-MRC-00186. Similarly, William A. Pruitt, the Commissioner of the VMRC, was provided a copy of Maryland's 1987 Policy when it was adopted and notified that the VMRC was circulating it to the Virginia counties for their use. MD Ex. AA-12.

Second, as set forth more fully in the next section, despite these statements, the evidence is undisputed that Virginia has continued to participate in Maryland's water appropriation permitting program, and Maryland has continued to insist that Virginia was and still is required to do so. It is thus uncontroverted that both States continued to adhere to their prior century-long interpretation and treatment of the Black-Jenkins boundary as the line of sovereignty. That interpretation and treatment are entitled to significant weight and confirm that Maryland did not relinquish any sovereign authority over the Potomac when it ratified the Black-Jenkins Award.

II. VIRGINIA'S ACQUIESCENCE IN MARYLAND'S ASSERTION OF SOVEREIGNTY OVER THE POTOMAC EXTENDS TO ALL EXERCISES OF REGULATORY AUTHORITY, INCLUDING THE REGULATION OF WATERWAY CONSTRUCTION AND WATER APPROPRIATION.

The same evidence that substantiates the mutual understanding of both States that the boundary line is an absolute line of sovereignty also confirms that Virginia has acquiesced in Maryland's regulation of the Potomac, without reserving any special exceptions for waterway construction or water appropriation activities. This mutual understanding is the reason why previously there "has been no case or controversy" and no need for the Court to exercise "original jurisdiction to resolve the questions now presented." VA Br. at 126. From the time of the Black-Jenkins Award until Maryland's denial of the Fairfax County Water Authority's permit request, Virginia consistently agreed, through the actions and words of its officials and citizens, that Maryland had the right to regulate the Potomac. During that one hundred twenty year time frame, there simply was no "dispute as to the boundary

between them." *New Jersey v. Delaware*, 291 U.S. at 376.[17]

There is no merit in any of Virginia's attacks on Maryland's acquiescence defense. *New Jersey v. New York*, which Virginia quotes for its opening contention that the defense "is inapplicable" in compact cases (VA Br. at 121), refutes rather than supports Virginia's argument. The Court's decision in that case makes clear that while the boundary line established by a congressionally-approved compact entered into between two States cannot subsequently be changed for "reasons of practicality and convenience," 523 U.S. at 810, a State may nevertheless acquire sovereign rights based on the doctrine of acquiescence and prescription even when a compact confers those rights on another State.

Although the Court in that case held that the Special Master could not for reasons of practicality and convenience adjust the boundary set forth in a compact between New York and New Jersey that Congress approved, the Court did not even allude to the rule that Virginia asserts governs here but, rather, provided a very different rationale in rejecting New York's affirmative defense that it acquired by acquiescence and prescription sovereign authority over the filled portions of Ellis Island. Following a 16-page discussion of that defense, *see id.* at 790-806, the Court held that there did not exist any "consistent understanding" of sovereignty over the Island and that "New York has shown nothing more than a modest number of sporadic acts that might be regarded as prescriptive." *Id.* at 805, 806. Such a lengthy discussion would have been completely unnecessary if, as Virginia

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[17] In light of the one hundred twenty year period that characterizes Virginia's acquiescence in Maryland's authority over the Potomac, Maryland thus does not need to rely upon the twenty year prescription period that the Arbitrators not once but three times stated "creates a right by prescription" (App. 28a) that confers ownership of and "title" (App. 40a) to territory upon one State regardless of whether that territory "originally belonged to the other." (App. 43a.)

contends, the acquiescence defense "is inapplicable in Compact cases." VA Br. at 121.

The Court discussed the issue of acquiescence because, contrary to Virginia's contention, acquiescence is a defense recognized by the Court in compact cases. Indeed, the Court first addressed the question whether New York had sovereignty over the filled portions of the Island under its compact with New Jersey. *See* 523 U.S. at 773, 780-85. After resolving that question against New York and holding that the compact conferred that sovereignty upon New Jersey, the Court addressed New York's "affirmative defense that it gained sovereign authority over the made land by subjecting it to prescriptive acts for a considerable period." *Id.* at 786. Thus, notwithstanding Virginia's assertion that a State may not acquire through the doctrine of acquiescence and prescription "rights protected by a federally-approved compact," VA Br. at 122, that is precisely what would have happened had New York met its "burden to 'show by a preponderance of the evidence . . . a long and continuous possession of, and assertion of sovereignty over' the filled portions of the Island, as well as New Jersey's acquiescence in those acts of possession and jurisdiction." *New Jersey v. New York*, 523 U.S. at 786-87 (quoting *Illinois v. Kentucky*, 500 U.S. at 384).[18] There is simply no merit in Virginia's argument that the acquiescence defense is inapplicable in compact cases. *See also Virginia v. Tennessee*, 148 U.S. 503, 522 (1893) ("Independently of any effect due to the compact as such, a boundary line between the states or provinces, as between private persons, which has been run out, located, and marked upon the earth, and

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[18] The Court's application of the preponderance of the evidence standard in *New Jersey v. New York* also refutes Virginia's assertion that a "clear and convincing" standard of proof should apply in this case "where one state contends that the other state's acquiescence amounts to *abandonment* of rights protected by interstate compact." VA Br. at 132 n.473 (emphasis in original). That is exactly the contention that the Court in *New Jersey v. New York* deemed was governed by the preponderance of the evidence standard.

afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive."). *See generally Illinois v. Kentucky*, 500 U.S. at 387 (acquiescence defense considered notwithstanding "congressional language describing Illinois' boundary in the State's Enabling Act of April 18, 1818, ch. 67, 3 Stat. 428").

Virginia's contention that "the period of time upon which the defense is based is too short," VA Br. at 122, is equally without merit. While the Commonwealth does not expressly state what that time period is, it appears to believe that the period is defined by the number of years in which Maryland has issued waterway construction and water appropriation permits. *See id.* at 89. Virginia's argument is flawed because it is factually undisputed that Maryland has manifested its sovereignty over the Potomac, both before and after the Black-Jenkins Award, through the universe of authority that States typically exert over territory within their boundaries, not solely through the exercise of the waterway construction and water appropriation permitting activities that Virginia seems to think define exclusively Maryland's ownership of the river.

Indeed, rather than embrace Virginia's crabbed view of sovereignty when recognizing a State's "sovereignty by prescription and acquiescence," *Georgia v. South Carolina*, 497 U.S. at 392, the Court has focused on not just one discrete area but instead on all categories of activity that, when considered collectively, represent a sufficient exercise of sovereignty to deem that State to be the unquestioned owner of the territory in question. For example, in finding that South Carolina's boundary included islands claimed by both that State and Georgia, the Court considered not just a grant made by South Carolina containing the islands, but also "the almost-uniform taxation of the property, the South Carolina seizure and subsequent sale for unpaid taxes, policing and prosecutorial activities by South Carolina

authorities, patrolling by South Carolina wildlife officers, and other factors." *Id.* at 392-93. Similarly, in finding that Louisiana's boundary included an island, Isle a Pitre, that Mississippi also claimed, the Court stated not only that "[t]he lands forming Isle a Pitre have been paying taxes to the state of Louisiana for years," but also that "[p]olitical and police control and jurisdiction by the parish of St. Bernard officials were exercised over the disputed area, and many instances are given of police control and jurisdiction by Louisiana officials over this general territory." *Louisiana v. Mississippi*, 202 U.S. 1, 55 (1906).

Likewise, in holding that certain waters of Green Bay and the islands they contained fell within Wisconsin's boundary notwithstanding Michigan's claim to the contrary, the Court cited, among other factors, the fact that Michigan admitted in its complaint that "Wisconsin has for many years disregarded the true and rightful boundary, * * * and has for a long time past possessed and does now possess, and has asserted and does now assert, civil criminal, and political jurisdiction over those portions of the territory within the Michigan boundaries above described . . . and has unlawfully taxed and still continues to unlawfully tax said property." *Michigan v. Wisconsin*, 270 U.S. 295, 317-18 (1926). *See also id.* at 306-07; 310-14. These cases are not unique but are typical of the cases in which the Court has upheld a State's acquiescence claim by examining a number of factors. *See, e.g., Arkansas v. Tennessee*, 310 U.S. 563, 567-71 (1940); *Maryland v. West Virginia*, 217 U.S. 1, 40-44 (1910); *Indiana v. Kentucky*, 136 U.S. 479, 509-10 (1890). *See also California v. Nevada*, 447 U.S. 125, 131-32 (1980); *Ohio v. Kentucky*, 410 U.S. 641, 648-51 (1973).

Consideration of the same types of factors here confirms Virginia's acquiescence in Maryland's regulation of the Potomac. Maryland's unrefuted evidence shows that both States have treated the boundary as the line of sovereignty for all purposes since the time of

the Black-Jenkins Award, that Virginia's Attorneys General, other officials, agencies, and citizens have recognized time and again that Virginia's sovereignty ends – and Maryland's begins – at that point, and that Virginia has "never exercised, or attempted to exercise, a single right of sovereignty or ownership," *Indiana v. Kentucky*, 136 U.S. at 510, on Maryland's side of the boundary. This case is thus the polar opposite of decisions on which Virginia relies in which the Court "rejected the doctrine of prescription entirely." VA Br. at 125. Unlike *New Jersey v. Delaware*, for example, in which the Court quoted the special master's "statement that 'at no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River within said twelve-mile circle, nor has it at any time acquiesced in the claim of the State of New Jersey,'" 291 U.S. at 376, Virginia has never exercised any sovereignty over any portion of the Potomac beyond low-water mark and has repeatedly recognized Maryland's authority from that point to Maryland's side of the river.

Virginia has not produced any evidence that creates a genuine issue of material fact in the face of Maryland's undisputed proof showing multiple acts and statements of Virginia agencies and officials that evidence Virginia's acquiescence in Maryland's continued exercise of sovereignty up to the low-water mark. Instead, Virginia argues that "none of those persons or entities had the authority to waive or relinquish rights belonging to the Commonwealth under her interstate compacts with Maryland, and which are affirmatively set forth in the Virginia Code." VA Br. at 127. This statement reflects two fundamental misunderstandings of the doctrine of acquiescence and prescription as applied to this case.

First, Maryland has never argued that Virginia has waived or relinquished any rights in the Potomac River, but rather maintains only that Virginia has acquiesced in Maryland's

longstanding regulation of those rights. Second, just as the Court is "not bound by state courts' resolution of interstate boundary disputes," *New Jersey v. New York*, 523 U.S. at 782 n.4, the law of one State concerning the authority of its officials does not control the sovereignty of another under the well-settled rule that this Court has applied again and again in recognizing the defense of acquiescence. The many affirmative recognitions by the Virginia Attorneys General and others since the beginning of the 1900s that the boundary is an absolute line of sovereignty are at least as significant as were the statements of the Attorney General of Kentucky that the Court relied upon in addressing the acquiescence defense raised in a boundary dispute between Kentucky and Illinois. *See Illinois v. Kentucky*, 500 U.S. at 386-87. Those opinions expressed by Virginia's chief law enforcement officer, in which he has unambiguously stated in a variety of contexts that Virginia has no authority over the Potomac beyond the low-water mark and that Maryland does, also carry at least as much weight and importance as the "belief of the inhabitants of disputed territory that they are citizens of one of the competing States.'" *New Jersey v. New York*, 523 U.S. at 798 (citing *Maryland v. West Virginia*, 217 U.S. at 41, 44; *Virginia v. Tennessee*, 148 U.S. at 527) (other citation omitted). Those opinions, when considered with the other evidence Maryland has submitted in support of its summary judgment papers – including, but not limited to, the hundreds of letters that the VMRC has written in which it has acknowledged that Virginia does not have any jurisdiction over waterway construction activities beyond the low-water mark and that Maryland does – confirm Maryland's right to regulate the activity at issue in this case.

Virginia also argues that "Maryland's previous litigation positions should estop it

from claiming that Virginia has lost its right to challenge Maryland's permitting system," VA Br. at 136, but it has not identified any past positions or statements made by Maryland that warrant such a result. Indeed, the Maryland Department of the Environment specifically identified in the Maryland administrative proceeding the factual predicate for its acquiescence defense in contending that no person or entity from Virginia had ever challenged Maryland's authority to regulate the Potomac. Virginia has produced no evidence that Maryland did or stated anything in that or any other proceeding that constitutes a "contradictory argument" or is "'clearly inconsistent' with its earlier position." *New Hampshire v. Maine*, 121 S.Ct. 1808, 1814, 1815 (2001).

Although Virginia argues that "Maryland has twice taken the position in this Court that there will be no 'case or controversy' until a Virginia citizen is actually denied access to the Potomac River," VA Br. at 136, Maryland's position is completely consistent with its acquiescence defense: No case or controversy previously existed precisely because Virginia has long recognized and acquiesced in Maryland's authority over the Potomac. Similarly, contrary to Virginia's assertion that Maryland's position in this case cannot be reconciled with its prior statement that it "has long recognized that Virginians hold riparian rights in the Potomac River," VA Br. at 138 (quoting Maryland), Maryland's recognition of those rights does not mean that they can be exercised without being subject to Maryland regulation. The courts of both States have long recognized that riparian rights are subject to government regulation, *see, e.g., Norfolk City v. Cooke*, 68 Va. 430, 434 (1876); *Baltimore & Ohio R. Co. v. Chase*, 43 Md. 23, 35-36 (1875), and it is Maryland, not Virginia, that has always maintained the right to regulate any activity that occurs on Maryland's side of the boundary

line. Virginia has acquiesced in the exercise of that authority.

In contrast to the inapposite technical arguments that Virginia offers in an attempt to defeat Maryland's acquiescence defense, the Commonwealth presents no substantive proof that generates a genuine issue of material fact. Rather than refute Maryland's evidence, the little evidence that Virginia has offered to show it has not acquiesced in the areas of water appropriation and waterway construction proves just the opposite to be true. In support of its argument that it has not acquiesced in Maryland's assertion of authority over water withdrawals from the Potomac, Virginia points to a letter dated August 5, 1977 (VA Ex. 183) as "evidence" that Virginia stated it "is aware of its rights and intends to protect them," VA Br. at 150, but the letter contains no language of any kind that could remotely be construed as contradicting the Commonwealth's century-long recognition, expressed in a number of ways by a variety of individuals, that Maryland has exclusive regulatory authority over the Potomac beyond the low-water mark.[19] On the contrary, rather than object to

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[19] Virginia is wrong when it states that it "disputed Maryland's claimed authority to regulate Virginia's withdrawals from the Potomac River" within three years after it became applicable to Virginians. VA Br. at 142. Contrary to Virginia's argument that "Maryland's 1933 statute did not apply to Virginia or its municipalities" until 1973, VA Br. at 141, the same term "person" that the Commonwealth contends was used in the 1973 law to broaden the reach of the statute, *id.*, appears in the 1933 statute as well. *See* 1933 Md. Laws Ch. 526, § 4 (MD Ex. CC-4). Virginia also fails to point out that the 1973 law defined the term "person" to include the same "state" or "county, municipal corporation, or other political subdivision of the state" language that Virginia finds so limiting in the 1933 law. *See* 1973 Md. Laws Ch. 4, § 1, MD Ex. DD-4 (recodified definition of "person"). The 1973 definition simply did not change the application of Maryland's appropriation law to Virginians. Indeed, Fairfax County, the Fairfax County Water Authority, the Great Eastern Utilities Corporation, the Potomac Electric Power Company, and the Town of Leesburg all submitted applications prior to 1973 under that law, *see* MD Ex. X, ¶¶ 8-18, and the Governor of Virginia, the Virginia State Water Control Board, and other Virginia agencies were aware that Virginians had been seeking permits under Maryland's appropriation law prior to 1973. *Id.*, ¶¶ 50-53,

(continued...)

Maryland's assertion of authority over the Potomac, Virginia stated in that letter that Virginia "is agreeable to your continued operation of the permit system in the interest of the riparian owners on both sides of the River." VA Ex. 183.[20]

Neither this letter nor the handful of LFAA-related statements that Virginia relies upon (VA Br. at 142-47) defeat Maryland's acquiescence defense because Maryland never wavered but persisted in its "long and continuous possession of, and assertion of sovereignty over, the territory delimited by the transient low-water mark." *Illinois v. Kentucky*, 500 U.S. at 384. *See also New Jersey v. New York*, 523 U.S. at 787 (quoting *Arkansas v. Tennessee*,

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[19] (...continued)
57, 58.

[20] That statement was not made out of the blue. Rather, Virginia has repeatedly stated that "a permit system is needed for the Potomac River, that Maryland has a workable permit system, and that Maryland's system is being administered in a way which is fair to Virginians." Memorandum from Frederick S. Fisher to the Virginia State Water Control Board (Aug. 4, 1977), VA Ex. 182 at 4. *See also* Memorandum of Agreement Between Maryland and Virginia (Oct. 8, 1976), MD Ex. DD-5 at VA-SRC-01437 (acknowledging that "[a]ppropriation permits issued by the State of Maryland have been used as the tool for managing use of the River in both Maryland and Virginia"); "Water Supply and Allocation Problems in Virginia: Report of the Legal Study Subcommittee of the State Water Study Commission" (Nov. 23, 1977), MD Ex. DD-8 at VA-SRC-002275 (stating that "Maryland's permit system on the Potomac River appears to be working well, and to be administered in a manner fair to Virginia"); David E. Evans, Assistant Attorney General, Commonwealth of Virginia, "The Legal Issues – Possible Solutions" (June 10, 1977), MD Ex. DD-6 ("The Maryland permit system is in being and is a mechanism for allocating water. It appears worthwhile and needed, and has been implemented in a fair way."). Indeed, when Virginia considered developing its own water appropriation permitting program in the 1980s, it looked to the Maryland program as a model. *See, e.g.*, State Water Control Board Memorandum (Aug. 21, 1984), MD Ex. DD-10, VA-SRC-000903 (recommending that Virginia enact an "appropriative permit system" that would be "similar to the permit program being used in Maryland"); State Water Control Board Memorandum (Sept. 20, 1984), MD-Ex. DD-11, VA-SRC-00863-65 (recommendation of State Water Plan Advisory subcommittee attached to internal SWCB memorandum stating that establishment of a "water appropriation permitting system, similar to that in existence in the State of Maryland" would "improve management of water resources" in Virginia).

310 U.S. at 570, for the proposition that "sovereign rights to land can be won and lost by 'open, long-continued and uninterrupted possession of territory'"). Indeed, Maryland rejected the suggestion that Virginia made in the 1977 letter referenced earlier that in the future the Commonwealth might create its own permit system for its political subdivisions, stating that "Maryland's appropriation law would still be applicable." VA Ex. 185. Maryland thus made clear that it did not regard Virginia as having any choice about Maryland's regulation of water withdrawals. As the Arbitrators stated in commenting upon a similar assertion of sovereignty that Lord Baltimore made by taking possession of the islands in the Potomac, this is "the most emphatic contradiction" that anyone "could give to any adverse claim, or pretense of claim." (App. 31a.)

Recognizing this, even Virginia's Counsel of Record expressed the concern internally during that time frame that "if Maryland continues to require permits of Virginia localities, and if its permit program is not challenged by Virginia, in time Maryland will acquire by prescription the right to require a permit from Virginia riparian users." VA Ex. 182 at 2-3. Maryland had already "acquired" such a right, however, in light of its longstanding assertion of control over the Potomac. Just as significantly, Virginia's verbal "protest" did nothing to "interrupt the continuity of the other state's adverse claim," VA Br. at 147, but rather gave way to complete capitulation, as Virginia continued to reinforce Maryland's control by foregoing then, as it has through the present day, any permitting system of its own. The Commonwealth reinforced again Maryland's control in the related context of waterway construction activities by referring hundreds of applicants to Maryland because Maryland, and not Virginia, had jurisdiction over such activities. In that context, as in every other

context involving Maryland's regulation of activities taking place beyond low-water mark, Virginia never made any assertion questioning Maryland's authority.[21]

While "inaction alone may constitute acquiescence when it continues for a sufficiently long period," *Georgia v. South Carolina*, 497 U.S. at 393, there is more than mere inaction on the part of Virginia. Notwithstanding Virginia's brief public posturing during the mid-1970s about Maryland's authority to regulate water withdrawals, the Commonwealth has failed to come forward with any proof showing "what its officers have done," *Illinois v. Kentucky*, 500 U.S. at 386, ever, to interfere with, much less stop, Maryland's "continuous and undisturbed exercise of sovereignty," *Arkansas v. Tennessee*, 310 U.S. at 570 (quoting 1 L. Oppenheim, International Law, p. 455 (H. Lauterpacht 5th ed.1937)), over the Potomac River. As Virginia's Counsel of Record cautioned the Virginia Water Control Board 25 years ago, such posturing, "unless supported by other direct Virginia actions, will not be sufficient to prevent Maryland's acquiring, in time, by prescription, authority to subject Virginia's riparian rights to the Maryland permit system." VA Ex. 181 at 3. Despite that warning, the Commonwealth has not identified any "direct Virginia actions" that it has ever taken, prior to filing this lawsuit, to disturb Maryland's continuous exercise of sovereignty over the Potomac River. This suit represents Virginia's "first well-authenticated instance of an effort . . . in the period of over a century" to assert sovereignty beyond the boundary line,

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[21] Indeed, while Virginia states that its Potomac River Riparian Rights Act "reaffirmed Virginia's rights in the Potomac River," VA Br. at 146, its own State Water Control Board, which is mandated by the Act to "advise and assist [Virginia] riparian owners in the proper exercise and protection of their rights," *id.* (quoting Va. Code Ann. § 62.1-44.114), has advised Virginians that Maryland, not Virginia, has the authority to regulate the construction of improvements in the Potomac that take place beyond the low-water mark. *See* n.8, *supra*, and accompanying text.

and "is of substantial weight in indicating acquiescence . . . in the boundary line restricting her jurisdiction to the river at the low-water mark." *Vermont v. New Hampshire*, 289 U.S. at 616. Virginia's claims should be denied because this litigation is too little, too late.

III. A DECISION IN VIRGINIA'S FAVOR WILL CREATE A REGULATORY VOID THAT WILL ADVERSELY AFFECT THE QUALITY AND USE OF THE POTOMAC RIVER.

Contrary to the assertion that Virginia makes in the penultimate section of its brief, a ruling in its favor and against Maryland will do substantially more than merely invalidate Maryland's water appropriation and waterway construction permitting requirements as applied against Virginia users of the Potomac. Although Virginia claims that the requirements of the U.S. Army Corps of Engineers will ensure protection of the environment and the Virginia local political subdivisions will ensure compliance with "the Virginia Uniform Statewide Building Code," Br. at 166, Virginia's localities have stated that they do not exercise their permitting authority for projects beyond low water mark because those projects are considered to be "under the jurisdiction" of Maryland, MD Ex. CC-30, and Congress has stated that the Corps's program is no substitute for a State's regulation of the navigable waters within its boundaries. *See, e.g.*, 33 U.S.C. § 1344(t). Such regulation is part of the States' obligation to manage submerged lands within their boundaries and hold them in trust for the public for navigation and fishing, *Bausch & Lomb Inc. v. Utica Mutual Insurance Company*, 330 Md. 758, 783, 625 A.2d 1021, 1033 (1993), and other public uses. *See, e.g., National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983) (limiting water appropriations to preserve wildlife habitat); *Van Ness v. Bay Head Improvement Ass'n*, 95 N.J. 306, 471 A.2d 355 (1984) (access to dry sand beaches). Those trust responsibilities may not be abdicated or bargained

away, *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 452-53, but that is precisely what will happen if Virginia prevails on its claims.

Indeed, while Virginia denies that a decision in its favor will create a "regulatory void," Br. at 165, Virginia has for years made clear, in the statements of its Attorney General[22] and the legislation of its General Assembly,[23] that it has no jurisdiction over construction activities beyond low water mark on the Potomac River. In an effort to downplay the gap that would occur if Maryland could not carry out its trust responsibilities over the submerged lands it owns off the Virginia shoreline, Virginia notes that Maryland will continue to have jurisdiction over construction activities in the Potomac pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and that, because of its federal origin, "Virginia does not contend that it violates the Compact of 1785 or the Black-Jenkins Award." Br. at 153. In its discovery responses, however, Virginia took a different position and stated that it recognized Maryland's authority to issue water quality certifications only to the extent the exercise of that authority is "consistent with Virginia's federal common law and interstate compact rights." MD Ex. DD-3 (Responses to Maryland's Requests for Admission, Nos. 64-66, 68-70). Virginia is thus being less than candid in purportedly assuring the Court that Maryland's congressionally recognized § 401 authority will "continue," Br. at 153, while trying to preserve the right to contend in any future case that Maryland may not exercise that authority if, in Virginia's opinion, it interferes in any way

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[22] MD Exs. CC-8 through 13.

[23] VA Br. at 159 (stating that under Va. Code Ann. § 28.2-1204 (Michie 1997) "the VMRC does not have any jurisdiction over the Potomac riverbed on the Maryland side of the boundary").

with the exercise of Virginia's riparian rights in the Potomac.[24] This is not, as Virginia claims, an adequate substitute for Maryland's permitting authority, particularly because it makes Maryland's public trust authority to govern activities on its submerged lands contingent upon federal law, which can be changed without Maryland's consent.[25]

A similar regulatory void will exist in the area of water appropriation if Virginia prevails in this case. While Virginia contends that invalidating Maryland's permitting authority over Virginia withdrawals will foster the regional cooperation necessary to "solve future water supply problems," Br. at 168, all of the regional cooperation that has occurred over the past thirty years has taken place under and, according to contemporaneous Virginia statements, *because of* Maryland's permitting authority. *See, e.g.*, MD Ex. X-54, MD-MDE-13122-27 (letter from Virginia State Water Control Board stating that "we are hopeful that under the auspices of the Maryland Water Resources Administration some equitable basis

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[24] Having characterized Maryland's water quality standards as providing "little discretion," Br. at 165, there can be little doubt that Virginia would object to Maryland's water quality certification authority if those standards are expanded to cover explicitly the full range of values potentially protected by § 401. *See, e.g.*, Debra L. Donahue, "The Untapped Power of Clean Water Act Section 402," 23 *Ecology L. Q.* 201, 217 (1996) (noting that as a result of *P.U.D. No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994), § 401 allows the States to regulate a wider range activities than simply discharges in order to ensure compliance not only with pollution-related water quality standards but other standards related to designated uses, anti-degradation, and minimum streamflow conditions).

[25] Nor is the Virginia building code adequate. While Virginia building inspectors may inspect wharves and piers off the Virginia shoreline to make sure that they are sturdy and well-maintained, their review is no substitute for the kind of environmental analysis required for more invasive activities, such as the construction of jetties and groins and riverbed dredging. *See, e.g.*, COMAR 26.24.02.03B (requiring consideration of, among other things, project's impact on food sources and habitat for finfish, crustaceons and other aquatic species, anadramous fish spawning grounds, sediment trapping functions, tidal circulation, and littoral drift). Moreover, the Wetlands Boards of Virginia's localities have already declared such projects to be beyond their jurisdiction. *See, e.g.*, MD Ex. CC-30.

for allocating withdrawals during times of critical low flow can be developed for all users of this vital water resource"). *See also* Declaration of Herbert M. Sachs, MD Ex. FF, ¶ 13. For its part, Virginia concedes it has done nothing to regulate water use in the Potomac, MD Ex. CC-15 (Interrogatory Response No. 4), even after its Attorney General cautioned that establishing its own permit system was the only way that would protect Virginia's riparian rights. *See* VA Exs. 181 and 182.

In an attempt to assuage any concerns the Court may have about a ruling in its favor, Virginia also contends that "Maryland's permitting system has done nothing to augment or improve the water supply for the Washington Metropolitan Area." Br. at 111-12. Quite the opposite is true. The Maryland water appropriation permitting program (Md. Code Ann., Envt. Art. § 5-501 *et seq.*; COMAR 26.17.06) is principally responsible for the protection and maximization of Potomac water supplies in three separate ways. First, by limiting the amount of water that users are permitted to withdraw to only that amount necessary to meet the user's current needs, the program ensures that water is not wasted or misused. *See* MD Ex. FF, ¶ 10. Second, it is through the Maryland-issued water appropriation permits that the restrictions of the Low Flow Allocation Agreement are made applicable to those users on the Potomac that are not parties to the Agreement. This ensures that users upstream of the Washington Metropolitan Area carry their share during periods of water shortage. *Id.*, ¶ 11. Finally, the Maryland permitting system maximizes water supplies through the application of its so-called "consumptive use regulations" (COMAR 26.17.07), which allow the

Department to head off low flow events.[26]

Ruling in Maryland's favor would leave in place the many ways the Maryland permitting program maximizes existing water supplies while allowing to continue the regional water supply coordination that has developed over the past thirty years, and will also allow Maryland to continue to meet its public trust responsibilities and preserve the ecological health of the Potomac.[27] Leaving Maryland's jurisdiction intact will continue the regulatory framework that has presided over the ascent of the Potomac to an American Heritage River prized throughout the region for its drinking water, recreational opportunities, and historical significance. *See* Executive Order 13061, "Federal Support of Community Efforts Along American Heritage Rivers," (Sept. 11, 1997), MD Ex. DD-12; Presidential

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[26] MD Ex. FF, ¶ 12. With respect to augmentation of the water supply for the Washington Area, it was also Maryland, and not Virginia or its political subdivisions, that took the lead in developing Jennings-Randolph, the single largest reservoir in the Potomac system. When the Corps proposed the reservoir in 1962, Maryland responded by stepping forward to assume the non-Federal costs of the multi-million dollar project and established the Maryland Potomac Water Authority (MPWA) for that purpose. *Id.*, ¶ 6. Although the utilities eventually assumed the MPWA's financial obligations in 1982, it was due to Maryland's action that the reservoir was built and became operational in 1981. *Id.*, ¶¶ 6,7. Virginia, by contrast, had "no comment" on the Corps' 1962 proposal, stating that "no action, financial or otherwise, by Virginia or any of its political subdivisions is needed to satisfy the requirements for local cooperation" and recommending that "future action on the interim report be in keeping with the desires expressed by appropriate officials of the State of Maryland and the State of West Virginia." MD Ex. FF-3, MD-MDE-20009. Virginia also stated that, in its view, the only benefits it would see from the project would be "due to regulation of flow in the Potomac River," which the Virginia Commission of Game and Inland Fisheries clarified "would have some effect upon the fishery in the Potomac River proper which borders Loudoun and Fairfax counties in Northern Virginia," *id.*, MD-MDE-20010, but that "[t]he Potomac, however, is Maryland water and, therefore, it appears we have no direct concern." *Id.*

[27] Far from undermining the reliability of the Potomac River water supply, it has been Maryland that is principally responsible for the protection, augmentation, and maximization of that supply. *See* MD Ex. FF.

Proclamation, "Designation of American Heritage Rivers By the President of the United States of America," (July 30, 1998), MD. Ex. DD-13.

CONCLUSION

For these reasons, the Court should rule in favor of Maryland on its motion for summary judgment and counterclaim because Maryland has acted properly in regulating the Potomac River and has authority to exercise its sovereignty over any activity that takes place in the river beyond the low-water mark.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2002, I sent by overnight delivery copies of the State of Maryland's Reply Brief and supporting papers to Frederick S. Fisher, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219; and Stuart A. Raphael, Esq., Hunton & Williams, 1751 Pinnacle Drive, Suite 1700, McLean, Virginia.

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